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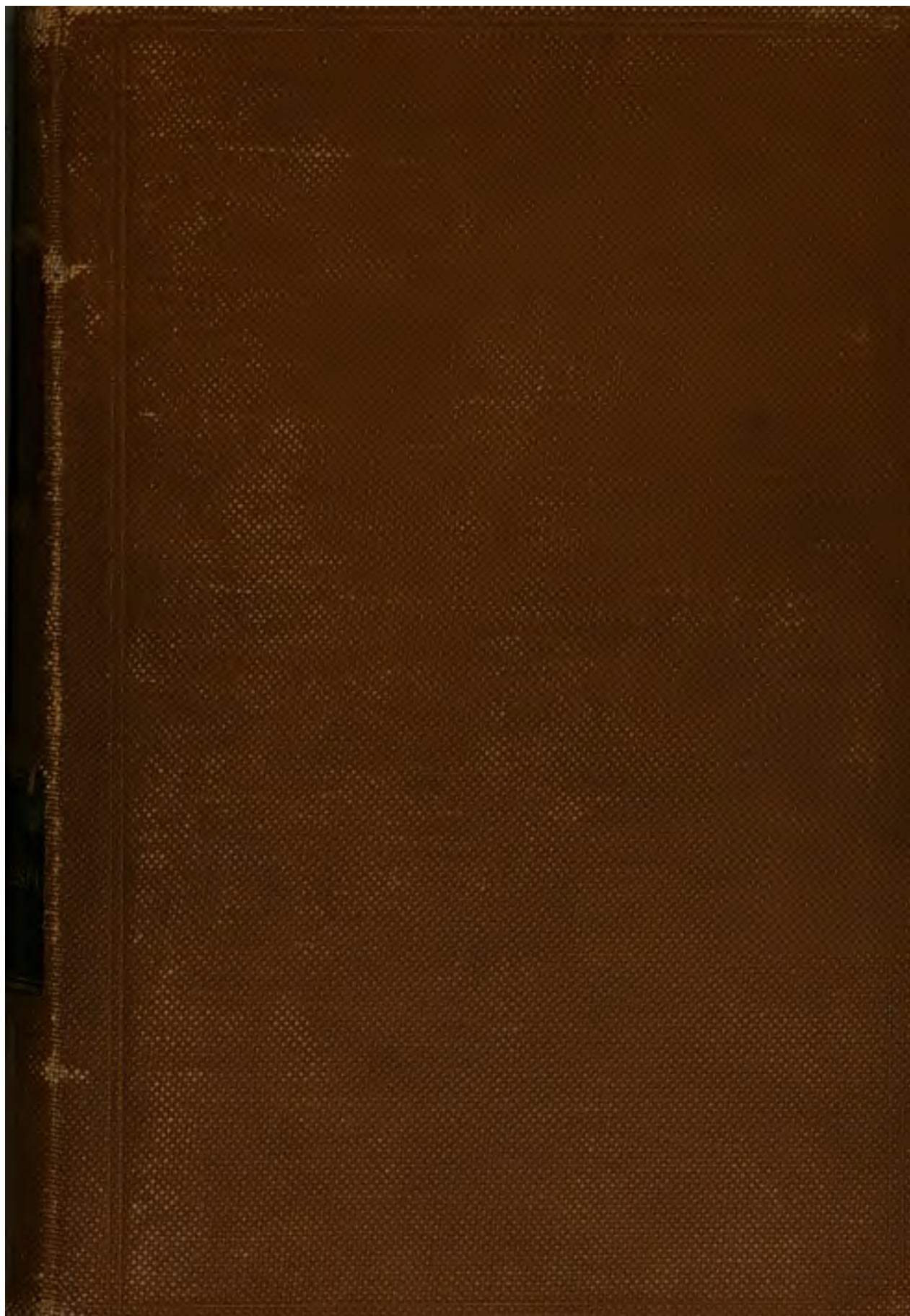
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A TREATISE
ON THE
LAW OF REAL PROPERTY

BY
WILLIAM F. WALSH
PROFESSOR OF LAW IN NEW YORK UNIVERSITY

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BY WILLIAM F. WALSH.**

PREFACE.

The primary purpose of this treatise is to state the law of real property as it is to-day in the simplest terms, and to outline and explain it always in the light of the reasons and principles which are the foundation of it.

The function of a treatise on law is entirely different from that of a digest or cyclopaedia. Instead of being a mere collaboration of decisions more or less conflicting, leaving the lawyer or student using it at sea in a great mass of confusing cases, the treatise should attempt, as far as its scope will permit, an analysis of the cases in the light of the fundamental principles of the law and its historical development, a reconciliation of apparently conflicting cases whenever possible, to the end that the true rule may be arrived at, and in cases of conflicting rules which cannot be reconciled, an honest attempt to determine which rule should prevail.

The author is convinced that it is the duty of legal educators to put the results of their labor and research in tangible form so that it may count for whatever it may be worth in the orderly development of the law. This development must come very largely through progress in legal education, not only of students who will be the lawyers and judges of to-morrow, but also of the lawyers and judges of to-day, on whose shoulders rest the immediate burden and responsibility. Legal education has only its beginning in the law school. It is continued constantly throughout the life of the progressive lawyer or judge. The results of the research and thought of legal educators who give their lives to a study of particular branches of the law in a broad way, with relation not only to the past and present but also to the future, cannot but be of value to the bench and bar in their progressive development of the law so that

it may keep pace with modern social progress. The busy judge or lawyer has little or no opportunity to do work of this kind. He is hard pressed with the necessity of disposing of the immediate cases in hand, without surplus time or strength for the exhausting work of research, the study and analysis of the rapidly growing mass of cases, and the comprehensive study of the entire field with reference to the future of the law as well as to its past and present.

That the law has not been keeping step in its development with the modern development of society generally is the conviction of most persons who have studied the matter. This finds its reflection in the tendency of the public to distrust law and lawyers. A great deal has been done to throw aside the empty forms and fictions of the past, but a great deal remains to be done. If lawyers and judges can be induced to discard legal fictions, to cast away obsolete rules having no possible bearing on modern conditions, however material they may have been in feudal times, a great step forward will be made. If they can be made to understand that the principle of *stare decisis*, properly understood, necessarily carries with it, not only the power, but also the duty, of the courts to make the law fit modern needs in a progressive way, throwing aside so much of it as is obsolete or false, we will be on the direct road to the correction of most of the weaknesses of our legal system. In addition, the courts should recognize frankly that it is their duty to correct judicial errors which have crept into the law. Certainly the principle of *stare decisis* does not call for the perpetuation of error, quite the contrary. Of course, where rules have become so established that a change by judicial decision would affect the rights of persons who may have relied on the law as laid down, the correction can be made only by statute, but in most cases positive error works positive mischief only and can be corrected by the courts without affecting unjustly any intervening rights.

This treatise has been written in the spirit of the convictions above expressed. Its scope has necessarily pre-

vented anything in the nature of an exhaustive treatment of the topics covered. The purpose has been to express and make clear the fundamental principles of the ownership of land and to discuss honestly and as fully as space will permit such questions as remain unsettled under the cases, and also, incidentally, to point out error, where error seems to exist.

The author gladly gives credit to the legal writers and authorities on whom he has always based his work as a student and teacher as well as a writer. For that part of the work devoted to the history of the law of real property and the common law of England, special credit is due to Digby's History of the Law of Real Property, and Williams Real Property. Most of the lists of cases used as the basis of the work were drawn from the American and English Cyclopaedia of Law, Cyc., Washburn on Real Property, and the admirable and more extensive works on real property by Professor Tiffany and Professor Reeves. These cases were examined and the notes taken therefrom became the basis of the text. Professor Gray's cases on property have been the basis of the author's work as student and teacher, and have been drawn from freely in this work. His work on Perpetuities, together with his cases on that topic, constitute the basis of the chapter on Perpetuities. Special credit is also due Professor Tiffany's comprehensive and scholarly work on Landlord and Tenant.

WM. F. WALSH.

New York University Law School.
November, 1915.

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THE LAW OF REAL PROPERTY.

CHAPTER I.

REAL AND PERSONAL PROPERTY.

A.—Nature of Property and Ownership.

§ 1. **Property.**—Property may be broadly defined as including all those things and rights which are the objects of ownership.¹ Anything which is not owned by some person or entity is not property. Every thing or right which has an owner is property, and the law of property is made up of the principles and rules governing such ownership. Ownership, in turn, may be defined as the right to the exclusive possession, control or enjoyment of the things or rights which are owned. He who is owner of land or chattels may always maintain or recover his possession as against everyone else.

§ 2. **Ownership; Absolute and Limited.**—When a man is absolute owner of any parcel of land or chattel, he has the right to its exclusive possession, control and enjoyment; he has also the absolute right to dispose of it as he sees fit, to give or sell it to others, to use or destroy it, or any part of it, at his pleasure, subject only to the rules of law governing his ownership by which he is bound as a member of society. No other persons can claim any such right therein. But ownership of property, and particularly of land, is very frequently not of this absolute nature, but limited or qualified. A tenant for years or for life of a parcel of land is just as truly owner of it during the continuance of his term as is an absolute owner, except that his ownership is limited

1. Williams on R. P. (17th Ed.), 1-3; 2 Blackstone Com. 16.

as to time, and will come to an end with the expiration of his term, and except also, that his ownership is subject to the rules of law which have been established for the purpose of protecting those who will become the owners of the land when his term expires. The term "ownership" properly applies to all interests in land or things, whether such interest be absolute or limited, conditional or unconditional, present interests with right of possession or future interests with no present right of possession. It also applies to mere rights in land, without possession, such as rights of way, and to mere naked rights having no corporeal object, such as a promissory note, a bond, or a share of stock. In short, ownership in each case means the exclusive right to the object owned, whether that be a chattel, an absolute or limited estate in land, a mere right in land not carrying with it possession, or a mere chose in action, or a right with no tangible object.²

§ 3. Uses of the Term "Property."—The term "property" has been used in several different senses (a) as applied to the rights of ownership rather than to the thing which is owned (b) as applied to the thing owned. A third application of the term has been described as "denoting

2. In Digby's Hist. R. P. (5th Ed.), 305, the author uses the term "ownership" as applying only to the actual possession and control of land or tangible things; for instance that the term applies to the interest of a tenant for life or for years, but does not apply to the interest of the landlord or reversioner, or to the owner of an easement, such as a right of way, which rights are termed *rights in alieno solo*. The difficulty with this is that it excludes all interests or rights in land or things not involving immediate possession and control thereof. If words are to be taken

in accordance with the meaning which has received general acceptance, then "ownership" must be construed as extending to rights involving no present possession or control of any corporeal thing as well as to the rights which are accompanied by such possession. Certainly a remainderman or landlord is the owner of the interest or estate which he has in the land. So also the man entitled to a right of way is the owner of the right though he has no present right to possession or control of the land itself.

valuable things—things which can be turned into value, or assessed at a money value.”³ It seems clear that the third usage includes the second, and that the second, carried to its logical conclusion, includes the third. Therefore the term “property” may be regarded as meaning, according to the context, either the right which the owner may have in corporeal things or in mere rights existing apart from anything corporeal; or it may be regarded as meaning the land or thing owned, or the interest or right in the land or thing, when the owner has a limited right of user or a right to the future enjoyment of the land or thing, or a mere right or chose in action, where one is owner of a mere right unconnected with any tangible land or thing. This latter meaning of the term as designating the objects of ownership, whether tangible or intangible, is the one generally followed, and is the meaning which more nearly accords with the general conception of the term.⁴

§ 4. Property, Corporeal and Incorporeal.—It is clear, therefore, that property includes incorporeal as well as corporeal things. Tangible objects of every kind are corporeal; they involve actual possession and present enjoy-

3. Wms. R. P. (17th Ed.), 4.

4. Mr. Digby divides all rights into rights *in rem*, viz.: rights available against all the world, and rights *in personam*, which may be enforced against certain and determinate person or persons. Rights *in rem* include all rights in land or tangible things, while rights based on contract or on injuries to person or property are rights *in personam*. He states that the law of property, broadly speaking, has to do with rights *in rem*, and that rights *in personam* must be excluded from this branch of the law. Digby's Hist. L. of R. P. (5th Ed.), 300-302. It

is true that rights arising from contracts or torts are not usually treated as rights with which the law of property has to do. The nature and incidents of their ownership may best be treated as part of the law of contracts or torts. Nevertheless, such rights are valuable; where they are causes of action which survive the death of either party, they must be included as part of the personal property of the deceased owner in the administration of his estate. They fairly come within the limits of the term property, even though the law of property has little to do with them, as it happens.

ment on the part of the owner. Incorporeal things are mere rights carrying with them no right to the present possession and control of any tangible thing. A tenant for years or for life is owner of the land during the continuance of his estate. The land is his for the time being; he has exclusive possession and control. But he who has a right to the future ownership of the land after the termination of such estate of limited duration, has a mere right, without the right of possession of any corporeal thing. He has a future interest in the land without any present right to the enjoyment or control of the land itself. This interest or estate is incorporeal; it is nevertheless valuable and must be treated as part of his property. So also in the case of easements and rights of a similar nature, as where A has a right of way over the land of B. In such case B is the owner of the land, the corporeal thing over which the right of way exists; nevertheless A has an interest in the land; he has the right to pass back and forth over B's land in accordance with the terms of the grant by which the right of way may have been acquired. This right of way is a valuable thing, clearly part of A's property, though it carries with it no possession or control of any tangible thing. In these cases the property may be described as intangible rights in tangible things. There is still another kind of intangible property, viz.: rights unconnected with any tangible thing, such as debts, promissory notes, bonds and shares of stock, etc. These are mere rights or things in action, yet they are valuable things and clearly they are part of the property of those to whom they belong.⁵

5. Wms. R. P. 5, 6.

This division of rights into corporeal and incorporeal has been freely criticised by writers on jurisprudence. (See Austin 11, pp. 707, 708). In Digby's Hist. R. P. p. 306, note, the author says in this connection: "The lawyer has nothing whatever

to do with the material corporeal land, except so far as it is the subject of rights. It is the distinction between the different classes of rights, and not between land on the one side and rights on the other that he is concerned with . . . The names 'corporeal and incorporeal' are most

B.—Distinction Between Real and Personal Property.

§ 5. **Things Real and Things Personal.**—Real property consists of things real and all rights or interests in things real which are objects of ownership, except terms for years, which, as we shall see later, are treated arbitrarily as personal property, the only explanation for the exception being the historical development of the law on this subject. Liens on land, though they are interests in things real, are nevertheless classed as personal property because they are incident to the debts or obligations which they secure, and therefore partake of their nature. Things real consist of land and all those things attached to the land permanently, such permanency being evidenced by the intention of the person making the annexation to attach the thing to the land as a permanent part thereof. Things personal include property of every other kind or description.⁶

The old division of property into movable and immovable things expresses the same idea. Movable things are always personal property, and lose their character as such only when they have been rendered immovable in the legal sense by being permanently annexed to land, which is immovable.

unfortunate because if by 'corporeal' is meant 'relating to land' then a large class of incorporeal hereditaments are also entitled to the name; if by 'incorporeal' is meant that they are mere rights then all hereditaments are incorporeal, because the lawyer is only concerned with different classes of rights."

As Mr. Digby then points out, these terms refer to different classes of rights. All rights, whether termed corporeal or not, are in and of themselves incorporeal, but as explained in the text, if the right involves possession and control of a tangible thing, it is called corporeal,

while if it is a right not involving such possession and control it is incorporeal. As Prof. Williams says (Wms. R. P. p. 4, note): "The student of any legal system, however, must take it as he finds it. It is idle for him to find fault with ideas which have obtained actual currency therein, and which he is therefore bound to accept as 'legal tender.' If any such ideas conflict with his sense of what ought to be, he should look for explanation to the history of the law."

6. Bracton, 101, 102; Digby Hist. L. of R. P. 303, 304; 2 Blackstone Comm. Ch. II.

It is, of course, obvious that the rules of law applying to land and to interests in land must be very different from the rules which govern the ownership of movable property. Land cannot be worn out, used up or destroyed; it cannot be carried from one place or country to another. . Whatever may become of the owner, his land must always remain at the same place for all time, subject to the laws of the state where it is situated. It cannot be transferred by delivery because, obviously, it cannot be delivered. On the death of the owner, the succession to its ownership must always be determined by the laws of the place of its location. Personal property, on the other hand, may be used up, worn out or destroyed; it may be moved freely from one place to another and may be transferred by delivery. It may be moved from one state to another, and therefore, on the death of its owner, the succession to its ownership must be determined by the laws of the owner's residence at the time of his death. The physical difference, therefore, between real and personal property is the real basis, and true reason for this classification in the law of property.⁷

§ 6. Effect of the Feudal System.—The feudal system, which became established in England shortly after the Norman conquest, had a profound effect in shaping the law of land. Under that system all the land of the kingdom was held of the king, the final or ultimate title being in him. His lords and barons held the land by grants from the king, they in turn granting to the vassals, who actually occupied the land, or granted it in turn to their retainers or tenants. The barons or lords rendered to the king, in return for the land, certain feudal dues and services for the most part of a military nature. Each vassal owed to his over-

7. Authorities cited in preceding note; Williams R. P. (17th Ed.), 10 11.

lord, by virtue of the feudal grant to him, the duty of rendering military or other services, as well as of doing homage and of attending at the manorial court. Subject to these feudal duties, the vassal or possessor of the land had an estate or interest therein either in fee or for life, and as long as these feudal dues or services were properly met and discharged, the estate was his to enjoy as he pleased, and the power of conveying the property and of disposing of it by will finally became his. Nevertheless, the ultimate, or allodial, ownership was not in him but the king. His holding was immediately of his over-lord, and mediately through his over-lord, of the king. His interest in the land was not absolute ownership, but only an estate, which signifies the extent of this interest, as an estate of inheritance, or an estate for life.⁸

The feudal system had to do only with things real, land and things permanently attached thereto, as above described. Such a system could not be extended to movable things, and therefore absolute ownership in things personal was always recognized. From this we find another basis by which to determine when property is real and when personal. If it is property which under the feudal system could be held by virtue of tenure, from the king as ultimate owner through an over-lord, it is real property; otherwise it is personalty. The reason why a term of years is not regarded as real, but personal, in spite of the fact that it is an interest in land, is because under the feudal system the holding of a tenant for years was not regarded as of sufficient importance and dignity to carry with it the incidents of feudal holdings. The interest of such a tenant was regarded originally as being solely contractual, and as not carrying with it an estate in the land, and as such holding was not included in feudal holdings, it follows that it has

8. See discussion of the feudal system in Chapter III herein and authorities there cited.

always been treated as personal property, and is known as a chattel real.⁹

§ 7. Origin of the Terms "Real" and "Personal."—

Real actions under the common law were actions resulting in judgments for the recovery of the specific thing of which the complainant had been deprived; the actual or real thing sued for was recovered. These actions were always actions for the recovery of land and whatever had become a part thereof by annexation. Actions for injury to movable property were called personal, and resulted in personal judgments for money damages. Even the action of replevin is a personal action, since the judgment therein is in the alternative, either to return the property or pay the damages which the judgment specifies. Therefore the term real came to be applied to land and real interests therein which could be recovered in real actions; while the term "personal" was applied to all other kinds of property where personal actions only could be maintained in case of the wrongful taking of the property. Although this is the historical explanation of the use of the terms, the form of action in each case is rather an incident of the ownership of the particular kind of property than a test by which to determine what property is real and what personal.¹⁰

§ 8. Things Annexed to Land.—As we have seen, real property is made up of land and those things which are attached to the land in a permanent way, and all interests therein which may be objects of ownership, while every other kind of property is classed as personal. There are several kinds of property, however, attached to land, or identified in use therewith which require special attention with reference to their classification as real or personal

9. See discussion of chattels real, § 22 of this chapter and authorities cited.

10. Bracton, 101, 102; Wms. R. P. (17th Ed.), 23-25.

property, a consideration of which will make more clear the line of demarcation between things real and things personal.

§ 9. **Fixtures.**— When a chattel is attached to land in a permanent way, with the intention on the part of the person who makes the annexation to incorporate the thing annexed with the land permanently, as a part thereof, it loses its character as a movable, becomes a part of the land and is termed a fixture; it is no longer personal property, but has become real property. Permanency of annexation is the essential thing, and the test which the law applies to determine such permanency, is the intent with which the annexation is made. That intent is not necessarily the actual state of mind of the person who made the annexation, but it is his intent as inferred from all the circumstances connected with the annexation, applying to him the test of the average man, the question being what the intent of the average man would be under the circumstances of the annexation. Articles which in their nature are fixtures, and if annexed by the owner would ordinarily become part of the land, retain their character as personalty where title to them remains in some one else after the annexation. Where, for instance, a fence was erected on land by one who occupied the land for a temporary purpose, under an agreement with the owner that the fence should remain his property, it was held that it did not pass with the land on a sale thereof.¹ So, also, in those cases where articles, in their nature fixtures, are attached to land under a contract of conditional sale or a chattel mortgage by the terms of which they are to remain the property of the vendor, they do not become part of the land, provided they retain their identity as distinct things, capable of removal and are not necessarily incorporated with the land as part thereof.² A de-

1. *Mott v. Palmer*, 1 N. Y. 564. under "Fixtures" in Chapter II

2. See discussion of this subject and cases there cited.

tailed consideration of the subject of fixtures will be found in Chapter II, following.

§ 10. Soil or Minerals Severed from Land.—If part of the soil be severed from the land, or if minerals, including stone, be taken therefrom with the intention of permanently severing them, and of converting them into movables or commodities, such soil or minerals become personal property. Where, for instance, dirt, sand and gravel were taken from the plaintiff's land by a trespasser, and used in filling in other land by a contractor who purchased it from the trespasser in good faith, it was held that the contractor was liable for its conversion. The dirt, sand and gravel became personal property as soon as severed from the land by the trespasser, who would be liable either in an action of trespass to land, or for conversion of personal property, he having carted away and sold it to the contractor as personalty. The contractor's liability in such case arises from his having converted it to his own use by using it in filling in the other land. It became incorporated with the other land and again became realty, and therefore could not be recovered in specie by the plaintiff, having lost its identity through such incorporation.³ So where stone is quarried from land and left thereon ready for shipment, such stone has become personal property and will not pass with the land on a sale thereof.⁴

§ 11. Growing Trees.—Trees growing in land are as much a part thereof as is the soil from which they spring, and by which they are nourished, and they pass with the land whenever it is transferred, whether by deed or by will or by descent.⁵ When trees are cut down with the intention

3. *Riley v. Boston Water Power Co.*, 11 Cush. (Mass.) 11; *McGonigle v. Atchison*, 33 Kan. 726, and cases therein cited. *Lacustrine Fertilizing Co. v. The Lake Quano, etc. Co.*, 82 N. Y. 476.
4. *Noble v. Sylvester*, 42 Vt. 146.
5. *Green v. Armstrong*, 1 Denio

of converting them into fire-wood or lumber, or into a commodity of any other kind, they become personal property, since they no longer continue identified with the land, but have been changed into an article of commerce, movable instead of immovable.⁶ If they are blown down by a storm or have fallen through natural causes, they still remain a part of the land on which they rest.⁷ They have not been severed by the act of any person with an intention of changing them into commodities or chattels. And even where they have been cut down with the intention of using some part of them for commercial purposes, the parts which remain, abandoned to the land, still continue to be real property. For instance, where trees were cut down for their bark, which was removed, and the trees, except for their bark, were left lying on the ground, the trees remained part of the land and passed therewith under a deed without reservation.⁸ The same principle applies in all cases where the tops of trees are left by men who cut them down for lumber and take away the trunks or logs.

Trees may become personal property without actual severance. Where A, the owner of a piece of land, sells the trees thereon to B, by instrument which transfers title to the trees to B, who is to enter and remove them either in a reasonable time, or within a stated period, they become B's personal property and may be transferred as such. Though physically attached to the land, they belong to one who has no interest or estate therein other than the right to have the trees supported by the soil until their removal. They are therefore severed in their ownership from

(N. Y.) 550; *Slocum v. Seymour*, 36 N. J. Law 138; *Cockrill v. Downey*, 4 Kansas 366; *Brackett v. Goddard*, 54 Me. 309; *Macomber v. Detroit, etc. R. Co.*, 108 Mich. 491; *Lerdy v. Proctor*, 97 Pa. St. 486, at 492.

cases cited below under this topic.

6. *Cook v. Whiting*, 16 Ill. 480, and cases cited in preceding note.

8. *Brackett v. Goddard*, 54 Me.

the ownership of the land, and cannot thereafter be treated as a part of it.⁹ If, however, they are conveyed by deed to B to remain on the property permanently, B acquiring the right to maintain the trees as part of the land indefinitely, they remain real property, B having acquired a real interest in the land as such.¹⁰

§ 12. Trees: Sale Under Statute of Frauds.—The fourth section of the statute of frauds, substantially enacted as part of the statutory law of each of the States, provides in effect that contracts for the sale of land, or an interest in

9. *White v. Foster*, 102 Mass. 375; *Slocum v. Seymour*, 36 N. J. Law 138; *Warren v. Leland*, 2 Barb. (N. Y.) 613; *Kingsley v. Holbrook*, 45 N. H. 313; *McClintock's Appeal*, 71 Pa. St. 365.

They need not be conveyed by deed under seal since they become personal property by virtue of their sale and therefore no freehold estate in land is created which would require a deed. Any contract of present sale and transfer sufficient to satisfy the statute of frauds will pass title. *Warren v. Leland*, 2 Barb. (N. Y.) 613.

Where, however, a freehold interest in the trees for life or in fee is transferred, the conveyance must be by deed. *Goodyear v. Vosburgh*, 39 How. Pr. (N. Y.) 377.

10. *Clapp v. Draper*, 4 Mass. 266; *Slocum v. Seymour*, 36 N. J. Law 138; *Dunworth v. Sawyer*, 94 Me. 242.

It was held in *Warren v. Leland* (2 Barb. 613) that a sale of trees by which title to them as personalty was transferred did not come within the Recording Act, and therefore the written contract of sale was

valid as against a subsequent purchaser of the land. Under the later cases the rule in New York is well settled that a sale of trees or other part of the soil, by written contract without severance, comes within the Recording Act, and such contract must be recorded to be valid as against a subsequent purchaser for value and without notice. *Lacustrine Fer. Co. v. L. G. Fer. Co.*, 82 N. Y. 476; *De Camp v. Wallace*, 45 Misc. (N. Y.) 436; *Vorebeck v. Roe*, 50 Barb. (N. Y.) 302. In the first case above cited (82 N. Y. 476), the court held that marl (part of the soil) was constructively severed and became personalty by reservation in the deed transferring the land, but while remaining attached to the land a sale of it by parol or by instrument not recorded was void as against a subsequent purchaser for value and without notice. The general rule is that transfers of trees, either by deed or contract, come within the Recording Acts, and must be recorded to be valid against subsequent purchasers of the land for value and without notice. *J. Neils L. Co. v. Hines*, 93 Minn. 505.

land, must be in writing. Therefore in all cases where a contract for the sale of trees is made, which contemplates the immediate transfer of title to the trees as they stand, the contract must be in writing, as a contract for the sale of real property.¹ Where the contract does not contemplate the immediate transfer of title to the trees, but where the intention is that such title shall pass to the purchaser only after they have been severed from the land and delivered to or taken away by him as chattels, the contract need not be in writing as it involves only the sale of trees after a severance and conversion into cordwood or logs which makes them personal property.² The cases are not in substantial conflict on the above proposition, as, obviously, there is no room for disagreement. However, the courts have disagreed in special cases as to whether the particular contract involved amounted to a present sale of the trees or was only an executory contract to sell them. Where the contract is for the sale of trees to be cut and removed by the vendee, within a fixed time, the courts in most jurisdictions construe it as a present sale, passing title immediately to the vendee, and hold, therefore, that the contract must be in writing.³ On the other hand, in some jurisdictions such a contract has been construed as an executory contract to sell, that title was not intended to pass until the trees have been actually severed by the vendee. From this construc-

1. *Green v. Armstrong*, 1 Denio (N. Y.) 550; *Saltonstall v. Little*, 90 Pa. St. 422; *Howe v. Bachelder*, 49 N. H. 204; *Cool v. Peters. etc. Co.*, 87 Ind. 531; *Spacy v. Evans*, 152 Ind. 431; *White v. King*, 87 Mich. 107; *Herrick v. Newell*, 49 Minn. 198; *Bent v. Hoxie*, 90 Wis. 625; *Whitmarsh v. Walker*, 42 Mass. 313; *Brackett v. Goddard*, 54 Me. 309; *Buck v. Pickwell*, 27 Vt. 157.

A contract for the sale of bark to be removed from the trees by the

vendee was held to be within the statute and required a written contract, in *Thompson v. Poor*, 57 Hun (N. Y.) 285.

2. *Smith v. Surman*, 9 Barn. & Cres. 561; *Killmore v. Howlett*, 48 N. Y. 569; *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 173 N. Y. 149.

3. *Green v. Armstrong* (1 Denio N. Y. 550) and cases cited in next to last preceding note.

tion it follows that such contract is for the sale and transfer of trees after they have been actually severed, and is therefore an executory contract for the sale and transfer of personal property, the vendee having a license to enter and cut down and remove the trees, which may be revoked before the trees are cut, but is irrevocable thereafter since the vendee's license is thereafter coupled with his interest in or ownership of the trees which have been cut.⁴ The argument in favor of this proposition is that it expresses the actual intent of the parties in the great majority of cases, in the absense of special circumstances or terms in the agreement indicating an intention to pass an immediate title to the trees; that where trees are sold for removal as cordwood or for lumber, the vendee has no idea of acquiring any present right to the use or possession of the trees. What he buys is the cordwood and logs and the privilege of entering and removing them. On the other hand, the vendor in the usual case has no intention of giving to the purchaser any greater interest in the land than this license. Suppose the sale relates to maple trees; do the parties intend that the vendee shall acquire the right to tap the trees for maple sugar during the years that may intervene before they are cut down, and that the vendor shall lose that right? So also with trees of any kind bearing fruit each year where the contract provides for the sale and removal of the trees only, it is improbable that the parties intended that the purchaser should become owner of the trees and entitled to their fruit before severance. Where the vendor is to cut and remove the trees, all the other circumstances being substantially the same, the courts in all jurisdictions agree that the contract is one involving the sale of personal prop-

4. *Bostwick v. Leach*, 3 Day Md. 666 (a very well-considered case); *Erskine v. Plummer*, 7 Me. 447; *Cutter v. Pope*, 13 Me. 377; *Byassee v. Reese*, 4 Metc. (Ky.) 372; *Fish v. Capwell*, 18 R. I. 667.
(Conn.) 476; *Fletcher v. Livingston*, 153 Mass. 388; *Drake v. Wells*, 11 Allen (Mass.) 141; *Purner v. Piercy*, 40 Md. 212; *Leonard v. Medford*, 85

erty, and need not be in writing. It is submitted that there is nothing in severance and delivery by the vendor which should make this difference. In either case the transaction is of the same nature, the purpose being to sell and buy cordwood or logs, whichever party cuts the trees. On the whole, this construction seems the better one, though the view that such contracts contemplate an immediate transfer, and therefore must be in writing, generally prevails. These cases seem to be based in some instances on the idea that because the trees are realty at the time the contract is made the Statute of Frauds applies since the contract is for the sale of that which is at the time part of the land. But this would be true also in those cases where the vendor is to cut and deliver the trees in the form of cordwood or logs, in which cases it is generally agreed the statute has no application.

In any case of the sale of trees to be cut by the vendee, where the contract is held void because not in writing, the courts agree in holding that the parol contract gives the vendee a license to enter and cut the trees, and if he enters pursuant thereto he is not liable as trespasser, and title to the wood or timber cut by him before his license is revoked passes to him; therefore he may enter within a reasonable time to remove the wood or timber so cut; his license being coupled with an interest therein cannot be revoked.⁵ Of course, the license to enter and cut timber may be revoked at any time by the vendor.

5. *Yale v. Seely*, 15 Vt. 221; *Buck v. Pickwell*, 27 Vt. 157; *Bennett v. Scutt*, 18 Barb. 347; *Owens v. Lewis*, 46 Ind. 488; *Spacy v. Evans*, 152 Ind. 431; *White v. King*, 87 Mich. 107; *Oconto v. Lundquist*, 119 Mich. 264; *Herrick v. Newell*, 49 Minn. 198.

See, also, cases cited in preceding note; it being uniformly held in those jurisdictions taking the view that the contract is executory and therefore

need not be in writing, that the vendee gets a license to enter and cut trees which may be revoked before the trees are cut, not afterwards, as to the trees actually cut; the chief difference in result from that reached in the cases above cited being that in case of revocation of the license before the trees are cut the vendee may maintain an action for breach of contract.

§ 13. **Effect of Failure to Remove Trees in Time Specified.**—Where a valid sale of trees or timber is made, to be removed within a stated time, the contract is construed as a sale of such trees as may be cut and removed within the time specified; the trees not removed remain a part of the land thereafter and revert to the vendor, the vendee losing his title by failing to remove them in accordance with the terms of the contract.⁶ Some cases hold that he cannot thereafter remove the cordwood and logs left on the land which he cut from the trees before the time agreed upon had expired.⁷ The prevailing view, however, is that the trees actually severed remain his personal property though not removed in time, but the vendee is liable in damages for breach of contract in leaving them on the land after the date fixed for their removal.⁸

§ 14. **Perennial Crops.**—Crops of all kinds which grow each season without replanting or re-sowing, are termed perennial, as distinguished from annual crops which must be planted or sowed each year the crop is to be produced.⁹ Perennial crops are frequently called *fructus naturales* as distinguished from *fructus industriales*, which is the term applied to annual crops. Neither expression is entirely accurate. It has been the law from an early date that the crop of hops is not to be classed with other perennials, as the

6. *Saltonstall v. Little*, 90 Pa. St. 422; *Utley v. Wilcox L. Co.*, 59 Mich. 263; *French v. Sparrow, etc. L. Co.*, 135 Mich. 424; *Kellam v. McKinstry*, 69 N. Y. 264; *McNiel v. Hall*, 107 App. Div. (N. Y.) 36, aff. 187 N. Y. 549; *Clark v. Guest*, 54 Ohio St. 298; *Alexander v. Bauer*, 94 Minn. 174; *King v. Merriam*, 38 Minn. 47; *Larson v. Cook*, 85 Wis. 564; *Hicks v. Smith*, 77 Wis. 146; *Strong v. Eddy*, 40 Vt. 547; *Saunders v. Clark*, 22 Iowa 275; *Fletcher v. Livingston*, 153 Mass. 388.

7. *Strong v. Eddy*, 40 Vt. 547.

8. *Hoit v. Stratton*, 54 N. H. 109; *Bennett v. Scutt*, 18 Barb. (N. Y.) 347; *Hicks v. Smith*, 77 Wis. 146; *Irons v. Webb*, 41 N. J. L. 203.

9. *Smith v. Jenks*, 1 Denio (N. Y.) 580; *Matter of Chamberlain*, 140 N. Y. 390; *Sparrow v. Pond*, 49 Minn. 412; *Purner v. Piercy*, 40 Md. 212; *Rodwell v. Phillips*, 6 M. & W. 501, and cases cited in notes which follow.

crop depends so entirely upon cultivation, though the roots from which the crop grows are perennial.¹⁰ This is an exception to the general rule. In a few other cases it has been held that the particular crops in question, though growing from perennial plants, should be classed with annual crops, because they depend almost exclusively upon care and cultivation for their production;¹ but aside from these scattered adjudications, the law remains as above stated.

Perennial crops, including grass and fruits of all kinds, as apples, peaches, oranges, grapes and berries, are subject to the same rules that govern trees. A sale of the crop purporting to transfer title immediately must be in writing, while an executory contract to sell the crop after it has been gathered or severed is a contract to sell personal property, and may be made by parol.² Such crops are part of the land under all conditions except where title thereto has actually been transferred to one who is not owner of the land by a writing sufficient under the Statute of Frauds.

Such crops, like the trees, bushes or roots from which they grow, pass with the land under a deed or mortgage without reservation,³ and a parol reservation by the vendor or mortgagor is void not only because it violates the Statute of Frauds, being a parol reservation of an interest in land, but also because parol evidence thereof is not admissible, since to admit it would be to violate the parol evidence rule, that the terms of a written instrument, as a deed or contract, shall not be changed or modified by parol testimony as between the parties to the instrument. To admit such

10. *Latham v. Atwood*, Croke, Chas. 515; *Frank v. Harrington*, 36 Barb. (N. Y.) 415.

1. *Crop of Peaches*. — *Purner v. Piercy*, 40 Md. 212; *State v. Fowler*, 88 Md. 601; *Vulicevick v. Skinner*, 77 Cal. 239; *Turpentine*—*Richbourg*

v. Rose, 53 Fla., 173; *Lewis v. McNatt*, 65 N. C., 63.

2. *Purner v. Piercy*, 40 Md. 212; see, also, §§ 12 and 13, *re* sale of trees under Statute of Frauds.

3. See cases cited in four preceding notes and cases cited in notes under §15 herein.

evidence and give effect to such reservation would clearly modify the terms of the deed or mortgage involved, since perennial crops generally would be included with the land and would pass therewith in the absence of such reservation.⁴ It follows from what has been stated that such trees or perennial crops cannot be levied upon as personal property since they are real property for all purposes, unless severed either actually or by written transfer.⁵

§ 15. Annual Crops.—Those crops which require sowing or planting every year the crop is to be produced are called annual crops, *fructus industriales*. It is not sufficient that the crop requires annual care and cultivation in order to produce a superior crop. With the exception of hops, and the few exceptional cases referred to in the preceding section, crops coming within this classification never grow from perennial roots, bushes or trees, but must be planted or sowed each year in soil prepared for them. Where fruit trees, berry bushes and other perennials are set out or planted, they constitute an improvement of the land of a permanent nature, and the crops which may mature therefrom each year cannot be regarded as owing their existence essentially to the labor expended upon them during the year. In the case of a crop planted each year and yielding only one crop, there is no enhancement in the value of the land, and the crop is the sole return for the labor expended.⁶ Nursery stock presents an apparent, but not a real excep-

4. *Sparrow v. Pond*, 49 Minn. 412, and cases cited in notes under § 15, *post*.

5. *Adams v. Smith*, 1 Breese (Ill.) 221; but in those cases and those States where crops perennial in their nature have been classified as *fructus industriales*, they may, of course, be levied upon like annual crops. *State v. Fowler*, 88 Md. 601.

6. *Sparrow v. Pond*, 49 Minn. 412; *Sexton v. Breese*, 135 N. Y. 387; *Powell v. Rich*, 41 Ill. 466; *McGuinness v. Fernandes*, 135 Ill. 69; *Tripp v. Hasceig*, 20 Mich. 254; *Coman v. Thompson*, 47 Mich. 22; *Terhune v. Elbertson*, 7 N. J. L. 297; and cases cited in notes immediately following under this and following section.

tion. Nursery stock is a crop in itself; the young trees, or bushes or vines are grown from seeds or shoots, not with the intention of making them part of the land permanently, but in order that when they are sufficiently developed for transplanting, they may be taken up and sold for permanent transplanting in other land. It is a crop requiring several years to mature, the result entirely of planting and cultivation, and in no way the product of perennial plants. It is therefore treated as *fructus industriales*, and comes within this classification as an annual crop.⁷

These crops which include crops of grain and vegetables of every description, are part of the land as a matter of fact while growing and attached to the land. As far as physical union is concerned, they are identified with the land as entirely as perennials, and except for certain well defined cases, they are always treated as part of the land. Thus, as between vendor and vendee, annual crops pass with the land under the deed without reservation.⁸ They cannot be reserved by parol, since the introduction of parol evidence of such reservation would tend to vary the terms of the deed, which, without such evidence, would be construed as transferring the crop with the land.⁹ Some cases lay down the contrary rule, but these cases cannot be sup-

7. *Batterman v. Albright*, 122 N. Y. 484; *Smith v. Price*, 39 Ill. 28; *Maples v. Milton*, 31 Conn. 598.

8. See cases cited in last two preceding notes; also *Penryn F. Co. v. Sherman-Worrell F. Co.*, 142 Cal. 642; *McCaslin v. State*, 99 Ind. 428; *Schmidt v. Williams*, 72 Iowa 317; *Erickson v. Paterson*, 47 Minn. 525; *Hersley v. Metzgar*, 90 Pa. St. 217; *Simanck v. Nemetz*, 120 Wis. 42; *Dayton v. Dakin*, 103 Mich. 65. See cases cited in notes immediately following, also cases cited under section 18, *post*.

Crops matured and ready for har-

vest are treated generally like other annual crops. *Tripp v. Hasceig*, 20 Mich. 254; though in some cases they have been held to be personalty, and therefore did not pass with the land. *Hecht v. Detman*, 56 Iowa 679.

9. *Austin v. Sawyer*, 9 Cowen (N. Y.) 39; *Smith v. Price*, 39 Ill. 28; *Firebaugh v. Divan*, 207 Ill. 287; *Garamplo v. Cooley*, 33 Kan. 137; *Kammrath v. Kidd*, 89 Minn. 380; *Bloom v. Welsh*, 27 N. J. L. 177; *Fiske v. Soule*, 87 Cal. 313; *Brown v. Thurston*, 56 Me. 126; *McLain v. Harris*, 20 Mo. 457.

ported on principle.¹⁰ In case of a devise of the land, annual crops thereon pass as part of it to the devisee.¹ In New York, under a statute which provides that such crops shall be treated as assets in the hands of the personal representative of a deceased owner, the courts are, of course, forced to hold that they are personalty, in such case, but they hold that such crops pass with the land to the devisee, not as part of the land, but as chattels specifically bequeathed, finding from the circumstances, in the absence of express disposition of the crop, an intent on the part of the deviser that the devisee of the land shall also have the crop.²

§ 16. Growing Crops—When Treated as Personalty.—

Annual growing crops are treated as personal property in two classes of cases: (a) for purposes of sale by the owner; (b) for purposes of distribution on the death of the owner intestate. In each of these cases the crop is regarded as assets in the hands of the owner who has produced it, or in the hands of his administrator in case of his dying intestate. Since the crop is produced by his labor and industry, and is the result of the business of farming in which he is engaged, it is reasonable and in accord with sound policy to permit him to treat the crop as part of his assets, subject to disposition as personalty at his election. Therefore, a contract for the sale of such crop need not be in

10. *Heavilon v. Heavilon*, 29 Ind. 509; *Benner v. Bragg*, 68 Ind. 338; *Baker v. Jordan*, 3 Ohio St. 438; *Backenstoss v. Stahlen*, 33 Pa. St. 251; *Kerr v. Hill*, 27 W. Va. 577, at 614.

In *Hendrickson v. Ivins*, 1 N. J. Eq. 562, the court held that where by mutual mistake the reservation of the crop was omitted from the deed, equity would reform the deed to conform with their intention. There is,

of course, no inconsistency here with the case of *Bloom v. Welsh*, cited in preceding note, which holds that a parol reservation is invalid.

1. *Cooper v. Wolfst*, 2 Hurl. & N. 122; *West v. Moore*, 8 East 339; *Bradner v. Faulkner*, 34 N. Y. 347; *Stall v. Wilbur*, 77 N. Y. 158; *Kinsman v. Kinsman*, 1 Root (Conn.) 180; *Smith v. Barham*, 17 N. C. 420.

2. *Stall v. Wilbur*, 77 N. Y. 158.

writing, and title to it will pass by parol sale.³ In case of his death, without having disposed of the land either by deed or will, it is only reasonable that the crop should be treated as it was during his life, as part of his assets, going to his administrator as personalty for distribution among his next of kin.⁴

§ 17. Levy of Execution on Crops.— Since annual crops may be sold by the owner as chattels, it follows that they may be levied upon as such under an execution on a judgment against the owner. A sale under such execution amounts to a transfer of the owner's title under compulsion of law, and therefore the sheriff can sell it as personalty just as the judgment debtor could have done.⁵ The sheriff, upon a levy under an execution, may wait until the crop

3. *Sexton v. Breese*, 135 N. Y. 387; *Batterman v. Allbright*, 122 N. Y. 484; *Kelley v. Goodwin*, 95 Me. 538; *Davis v. McFarlane*, 37 Cal. 634; *Graff v. Fitch*, 58 Ill. 373; *Sherry v. Picken*, 10 Ind. 375; *Westbrook v. Eager*, 16 N. J. L. 81; *Bloom v. Welsh*, 27 N. J. L. 177. See, also, cases cited in notes under § 15.

4. *Sherman v. Willett*, 42 N. Y. 146; *Bradner v. Faulkner*, 34 N. Y. 347; *Penhallow v. Dwight*, 7 Mass. 34; *McGee v. Walker*, 106 Mich. 521; *Noble v. Tyler*, 61 Ohio St. 432.

In *Bigley v. Columbus Southern R. Co.*, 98 Ga. 626, *Simmons, Ch. J.*, in an able opinion, reviews the law on the subject of growing crops. He makes it clear that such crops are in their nature part of the land, and that under the common law they have always been treated as such; that the only cases where such crops have been "treated" as personalty are cases involving their separate disposition by the owner who planted and

cultivated them. They are his exclusive property, apart from the land, the result of his labor and industry. They may, therefore, be taken to pay his debts under execution; they may be sold by him as exclusively his own, apart from the land, and on his death intestate, they go to his next of kin as part of his personal estate. These are exceptional cases with exceptional reasons supporting them, which take them out of the general rule that growing crops of any kind are real property.

5. *Batterman v. Allbright*, 122 N. Y. 484; *Hartwell v. Bissell*, 17 Johns. (N. Y.) 128; *Westbrook v. Eager*, 16 N. J. L. 81; *Patterson's Appeal*, 61 Pa. St. 294; *Raventas v. Green*, 57 Cal. 254; *Lindley v. Keeley*, 42 Ind. 294; *Throop v. Maiden*, 52 Kan. 258; *Preston v. Ryan*, 45 Mich. 174; *Erickson v. Patterson*, 47 Minn. 525; *Arnold v. Fowler*, 94 Md. 497; *Sims v. Jones*, 54 Neb. 769, and cases cited in next two notes.

matures before selling it, or he may sell it at once though it still be immature, since the owner may sell it before its maturity.⁶ The purchaser acquires the right to enter and take care of and cultivate the crop and harvest it when it matures; he acquires a license to enter for these purposes, but the license is limited to entry and acts on the premises strictly necessary or proper in the care or harvesting of the crop.⁷

As we have seen, trees and perennial crops, being realty for all purposes, cannot be levied upon as personal property. They cannot be levied upon and sold apart from the land as realty. The land as such can be levied upon and sold under execution only in its entirety by metes and bounds, everything attached to the land as part thereof passing on such sale.⁸

§ 18. Effect on Crops of Sale Under Foreclosure.— In the case of trees and perennial crops on land sold under foreclosure of a mortgage thereon, no question can arise. Such trees and crops pass as part of the land to the purchaser at such sale. But in the case of sale under foreclosure of lands on which are growing annual crops, some conflict of authority has arisen. The prevailing view is that they pass with the land to the purchaser at such sale. The lien of the mortgage extends to everything which, as between vendor and vendee, would be a part of the land. Therefore, the lien attaches to annual crops on the land as long as they remain unsevered. Of course, the mortgagor in possession is the owner of these crops; he may remove them from the land,

6. Craddock v. Riddlesbarger, 2 Dana (Ky.) 205; Parham v. Thompson, 2 J. J. Marshall (Ky.) 159, and cases cited in preceding note.

It has been held in two states that the crop must be mature so that it may be immediately severed at the

time of levy. Penhallow v. Dwight, 7 Mass. 34; Ellithorpe v. Reidesil, 71 Iowa 315.

7. See cases cited in last two notes.

8. Adams v. Smith, 1 Breese (Ill.) 321; and cases cited in three preceding notes.

or sell them by parol and pass title to them to another as personal property, but this ownership of his is always subject to the lien of the mortgage. Therefore if the crop is still attached to the land on the foreclosure sale, it passes therewith to the purchaser, whose title to the land has been secured by foreclosing—that is, extinguishing—every interest in the land subsequent and inferior to the lien of the mortgage. Therefore, the enforcement of this paramount title of the mortgagee forecloses or extinguishes the interest of the mortgagor in the crop as well as in every other part of the land. A purchaser of the crop from the mortgagor may remove it before the foreclosure sale, but if the crop is left on the land at the time of the sale, it passes with the land to the purchaser at the sale, since the purchaser of the crop can have no greater right therein than the mortgagor had, who sells it to him.⁹

The opposing view is based on the argument that a mortgage is a mere lien; that the crop may be sold as personalty, and if so sold is severed from the land and therefore cannot pass with the land on foreclosure. It seems clear that these cases beg the entire question. If the lien of the mortgage extends to annual crops, then a sale of the crop cannot affect the right of the mortgagee while the crop remains a part of the land by physical attachment. The purchaser of the crop must necessarily take it subject to the same rights and limitations which bound the mortgagor.¹⁰

§ 19. Water and Ice.—Water in a spring, lake or stream, or percolating through the soil, is not part of the land on

9. *Batterman v. Allbright*, 122 N. Y. 484; *Sherman v. Willett*, 42 N. Y. 146; *Penryn F. Co. v. Sherman-Worrell F. Co.*, 142 Cal. 643; *Missouri U. L. Co. v. Barwick*, 50 Kan. 57; *Wooton v. White*, 90 Md. 64; *Dayton v. Dakin*, 103 Mich. 65.

10. *Willis v. Moore*, 59 Tex. 628; *Hecht v. Detman*, 56 Iowa 679. In the latter case the decision was based on the fact that the grains were mature, and therefore it was personal property, and did not pass with the land, according to the Iowa rule.

which it rests or flows, nor has the owner of the land any absolute ownership of the water. He has, generally speaking, the exclusive right to its use while on his land, subject to restrictions which will be considered in a later chapter; but when the water flows from his land, he loses all right to it, and the owner of the adjoining land which has received the water will have the same right of user.¹

Ice formed on water situated on private land is the absolute property of the owner thereof and passes with the land as part of it. The owner has the exclusive right to take and dispose of the ice, without restriction.² Though water is not part of the land, ice formed therefrom must be regarded as a product of the land on which it rests, and a

1. 2 Bl. Comm. 14, 18. A detailed consideration of water rights will be found in Chapter XVII herein.

2. Washington Ice Co. v. Shortall, 101 Ill. 46; The Brookville, etc., Co. v. Butler, 91 Ind. 134; Richards v. Gaußret, 145 Mass. 486; Bigelow v. Shaw, 65 Mich. 341.

In *Huntington v. Asher*, 96 N. Y. 604; *Mitchell v. D'Olier*, 68 N. J. L. 375, and *Walker Ice Co. v. Am. Steel, etc., Co.*, 185 Mass. 463; the courts not only recognized that ice passes with the land as part thereof, but also held that where the owner of the land grants by proper instrument the right to enter and cut ice from water thereon, the right created is a *profit a prendre*, viz.: a corporeal interest in the land itself involving the right to take a part of it, as distinguished from an easement, which is a mere right of user. If ice may be a profit, it seems to follow that it must be part of the land.

As between a mill owner with a right or easement of flowage, and the

owner of the land flowed, the owner of the land is alone entitled to the ice. *Brookville, etc., Co. v. Butler*, 91 Ind. 134; *Stevens v. Kelley*, 78 Me. 445; *Hazelton v. Webster*, 20 App. Div. (N. Y.) 177; *Eidemuller Ice Co. v. Guthrie*, 42 Neb. 238; *Abbott v. Cremer*, 118 Wis. 377.

In *Swan v. Goff*, 39 App. Div. (N. Y.) 95, where plaintiff reserved not only a right of flowage, but also the right to the use of the land while flowed, the court held that he acquired the right to the ice by the terms of the deed.

The owner of the easement of flowage has a right to have the ice remain and melt where it is if taking it would so diminish the flow of water as to interfere materially with his water power. *Howe v. Andrews*, 62 Conn. 398; *Geer v. Rockwell*, 65 Conn. 316, 323; *Eidemuller Ice Co. v. Guthrie*, 42 Neb. 238. In most states it is held that taking of ice cannot so interfere with water power. See cases *supra*.

part of it. It is not a movable, wandering thing, like the water beneath, but has become fixed as an accretion to, or product of, the land. On the other hand, its only value is for removal and sale as a chattel. If not removed, it will soon melt and disappear. It is in no permanent way identified with the land, but is a mere temporary incidental product, belonging absolutely as such to the owner of the land, who has the sole right to dispose of it. It is in his possession and control, and therefore cannot be classed with fish and game at large. It has been held that unsevered ice may be sold by the owner as personalty, in spite of the fact that it passes with the land as part of it in case of conveyance, devise or descent, and this decision is based on sound reason. Ice is thus treated in much the same way as annual crops. It is part of the land generally, because attached to it and identified with it for the time being, but treated by itself it is of value only as an article of commerce, to be dealt with by the owner as part of his assets or profits resulting periodically from his ownership of the land and which he may therefore treat and dispose of separately as personal property.³ Of course, where ice has been actually severed, it is personal property.⁴

Ice formed on public waters—viz.: navigable streams and lakes—belongs to the people as a class, or the state as their representative, and may be cut and removed by the first person who takes possession of it. The riparian owner has no right in such ice superior to that of any other member of the public.⁵

3. *Higgins v. Kusterer*, 41 Mich. 318.

4. *Ward v. People*, 6 Hill (N. Y.) 144; *Gregory v. Rosenkranz*, 72 Wis. 220, and cases cited in preceding note.

5. *Wood v. Fowler*, 26 Kan. 682; *Slingerman v. International Cont.*

Co., 169 N. Y. 60 at 72; *Gage v. Steinkrauss*, 131 Mass. 222; *Woodman v. Pitman*, 79 Me. 456; *Rossmuller v. State*, 114 Wis. 169.

In *People's Ice Co. v. Davenport*, 149 Mass. 322, the court held that scraping off the snow from the ice of a great pond, held to be public

§ 20. **Manure.**—When in the regular and usual course of farming, manure made by live stock is accumulated on a farm, it is regarded as a part of the farm. In such case, if the farm be sold, mortgaged, devised or inherited, the manure in each case goes with the farm as appurtenant to it, and as between landlord and tenant, manure made on the land must be left there by the tenant at the end of his term.⁶ The reason for this rule is that good husbandry—viz.: good farming—requires that the manure resulting from the feeding of any hay or grain to live stock on the farm be returned to the soil in order that its fertility may be maintained. The use of the manure made on the farm for the purpose of maintaining the fertility of the soil, and for use each succeeding year in the growing of crops is so in accordance with custom and is so essential to good farming that it is treated as part of the farm. It is manifest that in all other cases, where the manure is not made in the regular course of farming, this rule has no application. In such case it is personal property, unless incorporated with the soil, since it is personal in its nature, not being a part of the soil nor identified with the land in any way.⁷ Where it is made from feed brought on to the farm, and not produced in the regular farming operations, it is held to be personal

water, and staking off the ice, was not such taking of possession as would give ownership in the ice as against any one else who might thereafter cut it.

As to rights of riparian owners along navigable streams in New York, see *Slingerland v. International Cent. Co.*, 43 App. Div. (N. Y.) 215; affirmed in 169 N. Y. 60; and *Statute, Laws 1895, ch. 853; Laws of 1879, ch. 388.*

6. *Goodrich v. Jones*, 2 Hill (N. Y.) 142; *Middlebrook v. Corwin*, 15 Wend. (N. Y.) 169; *Fay v. Muzzey*, 13 Gray

(Mass.) 53; *Kittredge v. Woods*, 3 N. H. 505; *Witherell v. Ellison*, 19 Vt. 339; *Chase v. Wingate*, 68 Me. 204.

In New Jersey it is held that manure is personal property in all cases unless actually mingled with the soil, or appropriated thereto by being thrown on the land. *Ruckman v. Outwater*, 28 N. J. L. 521.

7. *Fletcher v. Herring*, 112 Mass. 382; *Fay v. Muzzey*, 13 Gray (Mass.) 53; *Needham v. Allison*, 24 N. H. 355; *Haslem v. Lockwood*, 37 Conn. 500.

property.⁸ So, also, it is personalty when produced in a livery stable, or on land not used regularly for agricultural purposes.⁹

Even in the case of manure on farms, the owner may sell it as personal property and a contract for its sale need not be in writing.¹⁰ Like annual crops and ice, when dealt with separately, apart from the land, it is treated as personalty for the purposes of sale, though in case of the death of the owner, it passes with the land to the heir.¹¹ Unless incorporated with the soil it is never real property as a matter of fact; it is merely treated as though it were realty when accumulated in connection with farming because of the necessity for its use in maintaining the fertility of the soil.

§ 21. Stock in Land Corporations.— Before the nature of business corporations had come to be fully understood, some cases were decided to the effect that stock in corporations, the sole or chief asset of which consisted of land, partook of the nature of the land which the stock was supposed to represent, and was therefore realty.¹ It is now well settled everywhere that such stock is personal property. The stockholder has no interest in or title to the property of the corporation, and the stock gives him no title to such property. As stockholder he is entitled to his share of the dividends that may be declared out of surplus profits by the directors of the corporation, and to his share of any surplus that may remain when the corporation is wound up. He is also entitled to vote at stockholders' meetings. His stock is therefore a mere right of action, unconnected with any interest in any tangible thing belonging to the corpora-

8. *Gallagher v. Shipley*, 24 Md. 418.

9. *Fay v. Muzzey*, 13 Gray (Mass.) 53.

10. *Strong v. Doyle*, 110 Mass. 92; *French v. Freeman*, 43 Vt. 93.

11. *Fay v. Muzzey*, 13 Gray (Mass.) 53.

1. *Buckeridge v. Ingram*, 2 Ves. jr. 651; *Welles v. Cowles*, 2 Conn. 567; *Price v. Price's Heirs*, 6 Dana (Ky.) 107.

tion, whether real or personal. All such rights of action are necessarily personal property.²

§ 22. Chattel Interests in Land.—As we have seen, the interest of a tenant for years is as truly an interest in land, involving present ownership of it, and the absolute right to its possession and control during the term as is the interest of a tenant for life. In fact the interest of such a tenant for a long term, as for 999 years, is practically equivalent to a fee in so far as the value of the interest is concerned. The explanation for the rule that such terms are not real property, but only chattel interests therein, lies in the historical development of the law on this subject. Terms for years were not recognized as feudal holdings under the feudal system. Before the reign of Henry III, lessees had no interest in the land which was recognized by the law, and if the tenant should be wrongfully ousted by a stranger, he had no remedy. In case of his eviction by his landlord, he could maintain an action of covenant in case he held the land by covenant under seal, but in any other case he had no remedy, even against his landlord. His possession was treated as the possession of the landlord, and in no way involved tenure. The landlord, not the tenant, was seized of the land, and livery of seisin was not used in the creating of terms for years.³

In the reign of Henry IV a statute was enacted giving to lessees the right to recover possession of the land either from the landlord or from strangers in case of wrongful

² *Johns v. Johns*, 1 Ohio St. 350; *Russell v. Temple*, 3 Dana's Abr. (Mass.) 108; *Bradley v. Holdsworth*, 3 M. & W. 422; *Matter of Jones*, 172 N. Y. 575; *Lockwood v. Town of Weston*, 61 Conn. 211; *Cleveland Trust Co. v. Lander*, 184 U. S. 111.

Shares in a joint stock company are treated as personal property, choses

in action, like stock in an incorporated company. *Matter of Jones*, 172 N. Y. 575.

³ *Bracton*, Bk. 11, ch. 9, fol. 27, and Bk. IV, ch. 36, fol. 220; *Digby*, Hist. L. R. P. 176, 177; *Goodwin v. Goodwin*, 33 Conn. 314; *Brewster v. Hill*, 1 N. H. 350.

ejection. Thereafter a lessee had an interest in the land enforceable against all the world, as he has at the present time. Since his interest before this statute was merely a right of action in covenant, which would pass to his executor or administrator, and not to his heirs as realty, his interest in the land arising by virtue of the statute was treated as of the same nature, and was called a chattel interest in land, or a chattel real.⁴

Terms for years are, therefore, personal property, and no matter what the duration of the term may be, whether for a month or a thousand years, it will be subject to the rules of law applying to personalty.⁵

4. Cases in preceding note.

5. See § 140, *post*.

CHAPTER II.

NATURE AND INCIDENTS OF OWNERSHIP OF LAND.

A.—*Mines.*

§ 23. **Nature of Ownership in Mines.**—Minerals of every description while in place are, of course, part of the land, and therefore, in the usual case, the owner of land is owner also of mines or minerals which it may contain, and they pass therewith in case the land is transferred by deed or will without express reservation, or by descent.¹ But the mines or minerals in land may be owned by one person, and the surface of the land, and every part of it except such mines or minerals, may be owned by another. The owner of the land may, therefore, divide it horizontally as well as vertically, granting to another the substratum, containing mineral deposits, and retaining the surface in himself. In such case the grantee of the substratum or mine is as much the owner of so much of the land as is included in the grant as is the grantor the owner of the surface retained by him.²

The granting of the right to enter and take minerals from land, there being no intent to pass title to the minerals until severed, creates a *profit a prendre*, as the right to enter and take away some part of the land itself or of its produce is called, and title to the minerals remains in the grantor until severance. These interests and also the rights which the owner of the substratum, or mines, has in the surface, as against the owner of the surface, will be found discussed in Chapter XVII under "Easements and Profits."

1. 2 Bl. Comm. 18; *Caldwell v. Radcliffe*, 10 Wend. (N. Y.) 639; *Fulton*, 31 Pa. St. 475; *Clement v. Stinchfield v. Gillis*, 96 Cal. 33; *Youngman*, 40 Pa. St. 341; *Chartiers* 2. *Adams v. Briggs Iron Co.*, 7 Block C. Co. v. Mellon, 152 Pa. St. 286; *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 248; *Van Rensselaer v. Cush. (Mass.)* 361; *Plummer v. Coal Co.*, 160 Pa. St. 483, and cases in preceding note.

§ 24. **Gold and Silver Mines.**— Under the common law of England, all mines of gold and silver belonged to the King, not as an incident of sovereignty, but by virtue of the royal prerogative. The right to these mines was part of the crown's "regalian rights" and was based upon the supposed necessity of owning and controlling them in order to provide and issue currency for purposes of trade, and to supply means for the defense of the kingdom. The crown could grant the mines with the land, in which case the grantee became sole owner of the mines with the land, exactly as in the case of mines of any other kind.³ As a matter of fact, the crown did grant "all mines" and therefore mines of gold and silver in the lands included in the charters under which the American colonies were settled.⁴ It follows, therefore, that where such mines are now the property of any state, or of the United States, they are held by the state or nation as proprietary owner, exactly as where they are the property of a private individual. Therefore, where title to property has been acquired by private individuals through grant or patent from the state or nation under laws regulating the settling of land or otherwise, if the grant or patent be without reservation, they take mines of gold or silver with the land as part of it; and it may be taken as generally true that in the different states as well as under

3. *Case of Mines*, Plowd. 310. In this case the English rule was established as follows: "By the law all mines of gold and silver within the realm, whether they be in lands of the queen, or of subjects, belong to the queen by prerogative, with liberty to dig and carry away the ore thereof, and with other such incidents thereto as are necessary to be used for the getting of the ore." It was also held "that a mine royal, either of base metal containing gold or silver, or of pure gold and silver only, may, by the grant of the king, be severed from the

crown and be granted to another, for it is not an incident inseparable to the crown, but may be severed from it by apt and precise words."

See, also, *Moore v. Smaw*, 17 Cal. 199.

The rule that mines of other metals containing any gold or silver also belonged to the crown was changed by statute, 1 William & Mary, c. 30; 5 William & Mary, c. 6.

4. 3 Danes, Abr. 137; 1 Kerr, Real Prop. 85, 86; 2 Washburn, Real prop. (6th Ed.) 361.

patents from the United States, private ownership of land carries with it ownership of the gold and silver mines therein, except where such mines have been expressly reserved. After the crown had granted away the gold and silver mines in the lands covered by the Colonial Charters it no longer had any right to such mines, to which the state or nation could succeed on their separation from England. Certainly the ownership of these mines is not an incident of sovereignty, since they could be transferred by the crown at pleasure, and therefore the states and the nation did not succeed to them by virtue of sovereignty.⁵ In New York, gold and silver mines have been reserved in all grants by the state, and by statute it is expressly asserted that the state by virtue of its sovereignty is owner of all such mines.⁶ In other states, and in public territory of the United States, it is generally held that private ownership of the land carries with it title to gold and silver mines therein unless they are expressly reserved to the state.⁷

§ 25. Mining Claims.—Rights in mines acquired by discovery in public lands of the United States are controlled by the Federal Statutes.⁸ The acquisition of such rights in

5. *Moore v. Smaw*, 17 Cal. 199.

In *Hicks v. Bell*, 3 Cal. 219, it was held that the state was entitled to gold and silver mines as incident to its sovereignty, but this doctrine was overthrown in *Moore v. Smaw*, *supra*, in which case it is made clear that the ownership of such mines never was an incident of sovereignty, but merely a regalian right subject to alienation by the king like any private property; that such ownership is in no sense required for the purposes of sovereignty, and therefore in the United States gold and silver mines are the property of the owners

of the land, exactly like mines of any other kind.

In *Gold Mining Co. v. Ish*, 5 Oregon, 104, there is dicta to the effect that "mines of precious metals belong to the eminent domain of the political sovereignty," in the United States as well as under the laws of England and Spain.

6. 1 Kerr, Real Prop. 86.

N. Y. Laws of 1894, c. 317, §§ 80-85, provide that gold and silver mines belong to the state. These sections contain regulations pertaining to the discovery and working of mines.

7. *Moore v. Smaw*, 17 Cal. 199.

8. U. S. Rev. St. §§ 2318-2346.

the public land of any state is controlled by the statutory regulations of the particular state. In the western mining states there grew up a system of mining laws and customs and usages before the enactment of statutes on the subject, which are generally recognized as binding and valid when not inconsistent with the statutes as a sort of "common law of the mines."⁹ Therefore the law of mines and mining is made up of the customary law, the statutes, state and federal, and their application to the many different situations which have arisen, all forming a distinct and separate branch of the law, manifestly outside the scope of this treatise.

B.—Wild Animals.

§ 26. Property in Wild Animals.—Beasts and birds of the wood, untamed and not within the possession and control of any owner, are not property since they are not subject to ownership. The owner of the land on which such animals may be at any given time has the exclusive right to take them by killing or capture, while they are on his land, but that right is an incident of his ownership of the land, not a right of property in the animals themselves. Neither are they in any sense a part of the land, for as soon as they pass to the land of another that other has the same exclusive right to take them while on his land. The owner's right arises from his exclusive dominion over his land and his exclusive right to hunt and fish thereon.¹⁰ It has sometimes been said that wild animals belong to the state as representative of the public, but the state has no ownership in such

9. *Gold Min. Co. v. Ish*, 5 Oregon 104.

10. *Sutton v. Moody*, 1 *Ld. Raymond*, 250; *People v. Bootman*, 180 *N. Y.* 1; *Sterling v. Jackson*, 69 *Mich.* 488; *Shulte v. Warren*, 218 *Ill.* 108.

The right to hunt over water subject to an easement of navigation is

exclusively in the owner of the land over which the water may be. Those having the right of navigation have no right to hunt on or fish in such waters. *Sterling v. Jackson*, 69 *Mich.* 488; *Shulte v. Warren*, 218 *Ill.* 108.

animals as property. In fact they become property only when possession or control over them has been secured. The public generally has the right to hunt for and take game of any kind as long as the rights of no individual are violated, and the state in the exercise of the police power for the protection of the public has the right to enact laws to preserve game and to regulate hunting. This is all that is meant by the statement that the state is the owner as representative of the public.¹

When game has been reduced to possession by any person hunting lawfully therefor, it becomes his personal property. His possession must be such that the animals are under his control so that he may subject them to his use at pleasure.² But if the hunter kills game on land where his hunting is a trespass, the game belongs to the owner of the land where it is killed.³ It seems, however, that if the hunter starts game in A's land and drives it onto the land of B, and kills it there, the hunter is entitled to the game, since it did not come on B's land of its own volition.⁴ Where animals, wild by nature, such as bees, have been tamed or reclaimed, the owner's property right in them continues as long as he retains control over them, and if they return to the wild state they still remain his property as long as he can keep them in sight and within his control, so that he may re-take actual physical possession of them at his pleasure; but if he loses such control, they become mere wild animals again, and he loses all ownership in them.⁵

1. *Cummings v. People*, 211 Ill. 392; *People v. Bootman*, 180 N. Y. 1; *Geer v. Com.*, 161 U. S. 519; *Kellogg v. King*, 114 Cal. 378; *State v. Negaard*, 124 Wis. 474.

2. *Goff v. Kilts*, 15 Wend. (N. Y.) 550; *Bustin v. Newkirk*, 20 Johns. (N. Y.) 75; *State v. Shaw*, 67 Oh. St. 157; *Ulerg v. Jones*, 81 Ill. 403; *Rixroth v. Coon*, 15 R. I. 35.

3. *Sutton v. Moody*, 1 Ld. Raymond

250; *Blades v. Higgs*, 11 H. L. Cas. 621, and cases in last two notes.

4. Cases cited in preceding note. See criticism of this rule in *Blades v. Higgs*, *supra*.

5. *Goff v. Kilts*, 15 Wend. (N. Y.) 550, and cases in note 2, *supra*.

M'Conico v. Singleton, 2 Mills (S. C. Const. Repr.) 244, holds that the public has a right to hunt in uninclosed lands. Of course it is well

§ 27. **Fish.**—What has been said concerning animals of the wood applies also to fish. The owner of land under private waters has the exclusive right to take fish in such waters, and the fish become his property only when taken. The public have the same right to take fish as to hunt for wild animals, subject to the laws limiting and controlling this right enacted by the state in the exercise of the police power. This right extends to fishing in public waters, and also to fishing in private waters where the fishing is with the consent of the owner. Fish are not subjects of ownership until taken and title can be said to be in the state for the benefit of the public only in the sense in which that statement is used in connection with wild animals of the wood.⁶

C.—Border Trees.

§ 28. **Incidents of Ownership in Border Trees.**—Questions concerning trees, in so far as they involve the distinction between real and personal property, have been treated in Chapter I. Trees growing close to the line dividing the land of two adjoining owners, the roots and branches extending into or over the land of each are border trees. Where the trunk stands entirely in the land of A, and some of the roots and branches extend into or over the land of B, adjoining, the tree is exclusively the property of A, even to the roots and branches growing into or over B's land.⁴

settled that the public may hunt on land or water not held in private ownership. See cases in notes preceding.

6. *Hooker v. Cummins*, 20 Johns. (N. Y.) 90; *Beckman v. Kreamer*, 43 Ill. 447; *People v. Bridges*, 142 Ill. 30; *State v. Lewis*, 134 Ind. 250; *Treat v. Parsons*, 84 Me. 52; *State v. Shaw*, 67 Ohio St. 157; *State v. Roberts*, 59 N. H. 256; *Sollers v. Sollers*, 77 Md. 148. See, also, cases cited under § 26.

Oysters planted by an individual in a bed clearly marked out in an arm or bay of the sea are the property of him who planted them. *Fleet v. Hegeman*, 14 Wend. (N. Y.) 42; *Vroom v. Tilly*, 184 N. Y. 168.

4. *Masters v. Pollie*, 2 Roll. R. 141; *Holder v. Coates*, 1 Moo. & M. 112; *Hoffman v. Armstrong*, 48 N. Y. 201; *Lyman v. Hale*, 11 Conn. 177; *Skiner v. Wilder*, 38 Vt. 115; *Harndon v. Stultz*, 124 Iowa 440.

In such case, A is the owner of any fruit which may grow on such branches, and he has a license arising out of his ownership and the necessity of the case to enter upon B's land for the purpose of gathering such fruit.⁵

It has been urged that in such case the adjoining owner, B, should have ownership of so much of the trees as extends into or over his land, on the principle that his land includes everything permanently attached thereto by nature to an indefinite extent upwards and downwards; that as the tree draws nourishment from his land, he should have some ownership in the tree. The rule seems to have been settled on the theory that the ownership of the tree should be determined by the place where it was originally planted. At first entirely on the land of A, its branches and roots gradually extend themselves till they crossed the line into B's property. This, however, involves no wrong on the part of A or his predecessor in the title, but was entirely a process of nature, with which neither of the parties had anything to do. Therefore the tree, unquestionably A's property before the invasion of B's land, continues to be his property thereafter. To give B an interest in the tree commensurate with the extent to which it invades his land, or draws nourishment therefrom, is as a practical matter, impossible. Such a rule would make it necessary in every case to examine the roots of trees growing in a strip several rods wide on each side of the line to see if the roots extend into the adjoining land, and to what extent, in order to determine the ownership of the tree. Furthermore it would be manifestly impossible to determine the proportions in which they should own the tree, as tenants in common, and their interests would be constantly changing through the growth of the tree. To hold that each of the parties should own such trees in equal shares would be far more unfair and unjust than the established rule, and it would mean

5. *Hoffman v. Armstrong*, 48 N. Y. 201.

that the ownership of trees for several rods on either side of the line would be vague and uncertain, a situation which the law would not tolerate. It must always be remembered that the law is made up of rules which govern men in all their practical relations, and those rules must be practical and workable, even though they may conflict with some maxim of general application.⁶ For the same practical reason, ownership of the tree now depends entirely on the place where the trunk of the tree stands, irrespective of where it was planted. A definite, certain criterion by which ownership of the tree may be determined is of more importance than the satisfying of purely theoretical reasoning.⁷

§ 29. Right of Adjoining Owner.— Though the invasion of the adjoining owner's land by the branches and roots of such a tree involves no wrong on the part of its owner, nevertheless it is a burden imposed upon his land to which he is not compelled to submit. He may, therefore, cut the roots and branches to the dividing line, irrespective of the injury to the tree which may result. These roots and branches, when severed, continue to be the property of the owner of the tree, and if the adjoining owner converts them to his own use he is liable for their conversion.⁸

§ 30. Trees Growing Directly in the Line.— Where the trunk of the tree stands directly in the boundary line it belongs to the two adjoining owners as tenants in common, each having an equal undivided interest in the entire tree. The trunk must stand so that part of it is on the land of each of the parties in order to come under the rule.⁹ If a grow-

6. *Lyman v. Hale*, 11 Conn. 177; *Skinner v. Wilder*, 38 Vt. 115.

7. *Skinner v. Wilder*, 38 Vt. 115.

8. *Lyman v. Hale*, 11 Conn. 177; *Grandona v. Lovdal*, 70 Cal. 161, *Robinson v. Clapp*, 65 Conn. 365.

9. *Dubois v. Beaver*, 25 N. Y. 123; *Griffin v. Bixby*, 12 N. H. 454; *Robinson v. Clapp*, 65 Conn. 365; *Musch v. Burkhart*, 83 Iowa 301; *Harndon v. Sturdy*, 124 Iowa 440.

ing tree on a side hill, issues from the soil, very close to the line, but on the land of A, while the roots grow into B's land for the most part, it would appear that such tree is sufficiently on the line to be treated as the common property of both parties.¹⁰ Such trees are subject to the ordinary incidents of tenancies in common, in so far as applicable to trees, and if either party cuts the tree down, or otherwise destroys it, the other can sue him in trespass.¹

To hold that each adjoining owner is owner of the tree to the line in segments, with mutual rights of having the tree maintained in its entirety so far as may be necessary to the enjoyment of the tree by each of them, would not be in accordance with the nature of trees, which do not lend themselves to ownership in segments. A tree is a single plant, and as a practical matter the ownership should extend to the entire tree.²

D.—Emblements.

§ 31. **What are Emblements.**—The right of emblements is the right of a tenant, whose tenancy is of indefinite duration, to enter and take away annual crops maturing after the expiration of his tenancy, provided the crops were planted or sowed by him and that his tenancy was not ended by his own act or volition. Such crops, as we have seen, are a part of the land, and in the usual case pass with the land to the landlord or owner of the reversion or remainder, if still growing thereon at the expiration of the tenant's term. It is only in the special case of the tenant holding an interest or estate in the land of uncertain duration, who in good faith plants or sows a crop expecting that his ten-

10. *Holder v. Coates*, 1 Moo. & M. 112; *Waterman v. Soper*, 1 Ld. Raym. 737; *Skinner v. Wilder*, 38 Vt. 115 (at end of case).

1. Cases under note 9, *supra*.

2. In *Robinson v. Clapp*, 65 Conn. 365, the court held that either owner of a tree growing directly on the line

might cut the branches on his side of the tree to the trunk, but could not cut the trunk, since he should have at least as great right to cut branches as he would have if the tree stood in his neighbor's land, and the branches extended over the line.

ancy will continue till the time for harvesting, and whose tenancy is brought to an end before that time through the happening of some contingent and uncertain event, that the right to enter after the expiration of the tenancy and to harvest the crop is given. This special right or privilege is not based on the notion that such crops are personal property belonging to the tenant, or on any principal usually applying to the ownership of property. It is a special additional privilege given in such case in order to encourage good husbandry by inducing tenants of uncertain holdings to cultivate the soil as freely as tenants having definite and certain interests. This qualification of the usual principles of ownership of land is therefore based on the broad ground of public policy.³

§ 32. The Tenancy Must be of Uncertain Duration.—The tenancy must be of such a character that the tenant, at the time he puts in the crop, cannot be sure whether his tenancy will be brought to an end before the maturity of the crop or not. If the tenancy is for a definite term, as a tenancy for one year or five years, the right to emblements does not exist.⁴ A life tenant whose estate is subject to the uncertainty of the continuance of his life, has an estate

3. *Latham v. Atwood*, Croke, Chas. 515; *Mr. Spencer's Case*, C. P. Winch 51; *Graves v. Weld*, 5 Barn. & Adol. 105; *Stewart v. Doughty*, 9 Johns. (N. Y.) 108; *Harris v. Frink*, 49 N. Y. 24; *Debow v. Colfax*, 10 N. J. L. 128; *Bradley v. Bailey*, 56 Conn. 374; *Simpkins v. Rogers*, 15 Ill. 397; *Reilly v. Ringland*, 39 Iowa 106; *Chesley v. Welch*, 37 Me. 106, and cases cited in notes following.

The doctrine of emblements applies only to growing annual crops, as defined in Chapter 1 of this work. The doctrine does not apply to perennial crops such as growing grass, fruit.

etc., even though grown from seed sown by the tenant. 1 *Williams on Exrs.* 670, 672; *Reiff v. Reiff*, 64 Pa. St. 134; *Graves v. Weld*, 5 Barn. & Adol. 105. It would seem that if the *first crop* of a perennial matures within one year after planting the tenant should be entitled to it as emblements. See *Graves v. Weld*, *supra*. 4. *Whitmarsh v. Cutting*, 10 Johns. (N. Y.) 360; *Thomas v. Noel*, 81 Ind. 382; *Howill v. Schenck*, 24 N. J. L. 77; *Dircks v. Brant*, 56 Md. 500; *Wheeler v. Kirkendell*, 67 Iowa 612; and cases cited in preceding note.

of indefinite duration, and therefore his personal representative has the right to enter after his death, and harvest any crop planted or sowed by him.⁵ If a life tenant leases the land to a tenant for a fixed term, such tenant has the right to emblements if his tenancy is terminated by the death of the life tenant, since his tenancy depends on the life estate, out of which it has been created, and will be brought to an end by the termination of the life estate.⁶ Where land was given to a woman during widowhood, creating in her a life estate, since it might continue for life, it has been held that a tenant for a fixed term, holding under her, is entitled to emblements on the termination of his estate by her re-marriage, his tenancy being of uncertain duration, since it depended on her life estate.⁷ Tenancies at will supply another illustration of the sort of tenancy to which this right is incident. The interest of such a tenant may be ended by the landlord at any time, and if so ended, the tenant is entitled to take away the crop then growing upon its maturity, provided it was planted by him.⁸ A tenant by sufferance, however, is not entitled to emblements for, as we shall see later, he is in no true sense a tenant, his holding being wrongful.⁹

§ 33. The Tenant Must Have Planted or Sowed the Crop.

— If a life tenant, tenant at will, or any other tenant holding for an uncertain period, finds a crop growing upon the land at the time of the commencement of his tenancy, which was planted by someone else, and thereafter his tenancy is

5. *Latham v. Atwood*, Cro. Car. 515; *Reilly v. Ringland*, 39 Iowa 106; *Thornton v. Busch*, 20 Ga. 791; *Talbot v. Hill*, 68 Ill. 106.

6. *Bradley v. Bailey*, 56 Conn. 374; *Graves v. Weld*, 5 Barn. & Adol. 105, where tenancy was determinable on three lives.

7. *Debow v. Colfax*, 10 N. J. L. 128, citing *Oland v. Burdwick*, Cro. Eliz.

461, and *Blackstone's Commentaries*.

8. *Harris v. Frink*, 49 N. Y. 24; *Simpkins v. Rogers*, 15 Ill. 397; *Reilly v. Ringland*, 39 Iowa 106; *Dobbins v. Lusch*, 53 Iowa 304; *Chandler v. Thurston*, 27 Mass. (10 Pick.) 205; *Bittinger v. Baker*, 29 Pa. St. 66.

9. *Miller v. Cheney*, 88 Ind. 466, 470.

brought to an end in some way other than by his own act, he is not entitled to emblements because he did not plant or sow the crop. This rule holds good no matter how much care and labor he may have expended upon the crop in caring for and cultivating it. The right of emblements is given in order to encourage initiation on the part of such tenants in planting crops, and to come within the rule they must have planted or sowed the crop themselves in order to be entitled to take it away as emblements.¹⁰

§ 34. The Tenancy Must Not be Terminated by the Tenant.—If the tenant terminates the tenancy himself, by his own act and volition, he has no right to emblements. He will not be permitted to terminate the estate and free himself from the obligations incident to it, and at the same time retain the ownership of a crop, encumbering the land therewith till its maturity. Therefore, where a tenant at will brings the tenancy to an end by his own act he is not entitled to emblements.¹ Where a clergyman had as part of his compensation a tenancy which was to continue during his term of service as pastor, and he gave up the position voluntarily, he was not entitled to the crop then growing upon the land as emblements; nor could a third party, who had purchased the crop from him before the termination of his estate, take the crop on its maturity, since such purchaser could acquire no greater interest in the crop than the clergyman had.² So if a tenant from year to year, or from month to month, terminates the tenancy by giving the requisite notice, he would not be entitled to emblements after the termination of his tenancy.³

10. *Mr. Spencer's Case*, C. P. Winch 51; *Debow v. Colfax*, 10 N. J. Eq. 128; *Bradley v. Bailey*, 56 Conn. 374; *Haslett v. Glenn*, 7 Har. & J. (Md.) 17, and cases cited in preceding notes on this topic.

1. *Samson v. Rose*, 65 N. Y. 411; *Chandler v. Thurston*, 27 Mass. (10

Pick.) 205; *Chesley v. Welch*, 37 Me. 106; *Talbot v. Hill*, 68 Ill. 106; *Kiplinger v. Green*, 61 Mich. 340.

2. *Debow v. Colfax*, 10 N. J. L. 128.

3. *Reeder v. Sayre*, 70 N. Y. 180; *Stewart v. Doughty*, 9 Johns. (N. Y.)

103.

§ 35. **Effect of Enforcement of Superior Title.**— Though all the requisites to emblements be present, the enforcement of a title superior to that of the tenant, the enforcement of which destroys or wipes out his tenancy, will take away from him his right. Therefore, if it turns out that the tenant holds from one who has no title, the tenant cannot claim emblements as against the real owner of the land.⁴ Where a tenant takes land subject to a mortgage, the lien of the mortgage antedating his tenancy, he cannot claim emblements as against the purchaser of the property on foreclosure sale since the lien of the mortgage covers the growing crops as part of the land, and its foreclosure, in which action the tenant is made a party, wipes out the interest of the tenant both in the land and in the crops.⁵

Where the tenant holds from a landlord who has an estate upon condition in the land, subject to forfeiture for breach of the condition, and the landlord's estate is forfeited for breach of the condition, the tenant is entitled to emblements as against the one who enforced the forfeiture since his tenancy was of uncertain duration because subject to the condition, like the estate of his landlord out of which it was created, and like the landlord's estate, it was destroyed by the enforcement of the forfeiture.⁶ All the requisites of emblements are present, the tenant having in good faith planted the crop believing that his tenancy would continue until its harvest, and his tenancy having been ended without wrong on his part. Where the tenant him-

4. *Coke on Littleton*, 55b; *Simpkins v. Rogers*, 15 Ill. 397; *Rowell v. Kline*, 44 Ind. 290; *Howell v. Schenck*, 24 N. J. L. 89.

5. *Lane v. King*, 8 Wend. (N. Y.) 584; *Howell v. Schenck*, 24 N. J. L. 89. See, also, *Sherman v. Willett*, 42 N. Y. 146, and *Batterman v. Albright*, 122 N. Y. 484.

6. *Sampson v. Rose*, 65 N. Y. 411; *Bevans v. Briscoe*, 4 Har. & J. (Md.)

139; *Doe d. Upton v. Witherwick*, 3 Bing. 11.

In *Monday v. O'Neill*, 44 Neb. 734, the purchaser under foreclosures permitted the tenant to remain in possession while he grew and harvested the crop. The court held, very properly, that the crop belonged to the tenant, as he was not a trespasser in growing it, having done so with the consent of the purchaser.

self breaks the condition which causes the forfeiture he is not entitled to emblements, having brought the tenancy to an end by his own act. There is no real difference between these cases and cases of tenancies ended by foreclosure of a superior mortgage. In this latter case the tenant should be allowed emblements, though the law is well settled to the contrary. His tenancy is uncertain, his crop was planted in good faith and his tenancy was ended without fault on his part. Every consideration of public policy that supports the right to emblements in other cases would seem to apply with equal force to these cases of tenants holding subject to a mortgage or to a conditional estate. They are in no sense wrongdoers, and therefore cases of tenants holding under a landlord having no title are not at all parallel.⁷

§ 36. Right to Way-going Crop.—In several states the courts have recognized and given effect to a custom existing in those states that a tenant from year to year shall be entitled to winter crops, viz.:—crops sowed in the fall and maturing the following summer—when his tenancy is brought to an end by his landlord in the spring before the crop has matured.⁸ This right is based on custom, and where in any case the custom is not established so that it may be treated as forming part of the contract of letting, the right will not be recognized.⁹ It has, of course, no connection with the right of emblements, and both rights may exist independently in the same case.¹⁰ This right applies only to winter crops, and not to crops sowed or planted in the spring.¹¹

7. See three preceding notes.

8. *Wigglesworth v. Dallison*, 1 Doug. 201, 2 Smith's L. Cas. 842; *Reeves v. Hannan*, 65 N. J. L. 249; *Howell v. Schenck*, 47 N. J. Eq. 73; *Shaw v. Bowman*, 91 Pa. St. 414; *Clark v. Harvey*, 54 Pa. St. 142; *Bettinger v. Baker*, 29 Pa. St. 70.

9. *Reeder v. Sayre*, 70 N. Y. 180;

Dircks v. Brant, 56 Md. 500.

10. *Bettinger v. Baker*, 29 Pa. St. 70, and other cases cited in last two notes.

11. Cases cited in preceding notes.

F.—Fixtures.

§ 37. **Nature of Fixtures.**—A chattel annexed to land in a permanent way so that it has lost its character as a movable thing and has become permanently identified with the land to which it is attached so as to become, if annexed by the owner of the freehold, a part thereof, is a fixture, provided it still retains its identity as a distinct thing, apart from the land.¹ Permanency of annexation, as a result of which the thing affixed loses the attributes of personal property and acquires those of real property, is the essential test. If, however, the thing annexed is so merged with the land as to lose its identity as a distinct thing, it is not a fixture. Therefore, building material, such as lumber, brick and stone, when used in the construction of a permanent building, lose their identity as separate things and are not fixtures, though the building itself, which would be personal property apart from the land, is a fixture when erected as a permanent improvement of the land on which it stands. In the same way, stone or soil whenever severed from one parcel of land, and used in filling in or grading another parcel, though personal property while so severed and before being used in such filling in or grading, become merged with the second parcel when so used, losing their identity as separate distinct things, and therefore cannot be treated as fixtures.²

1. Where a fixture is annexed by the owner in fee who is also owner of the fixture, it becomes part of the land. But where title to the fixture remains in some one else, after annexation, or when annexed by a tenant for years without intent to leave it permanently there, it remains personal property. The same test applies to each of these cases, however, which applies to the usual case of an annexation by an owner in fee. In

each case it is a fixture if it would have become part of the land, had the owner in fee annexed it, he also having title to it at the time of annexation. The term "chattel fixtures," applies to these two classes of cases.

2. *Carkin v. Babbitt*, 58 N. H. 579; *Michigan & C. Ins. Co. v. Cronk*, 93 Mich. 49; *Pierce v. Goddard*, 22 Pick. (Mass.) 559. See § 10, *ante* and cases cited thereunder.

As we have already seen,³ and as will appear more fully later⁴ a fixture may become the property of some third person who has no estate or interest in the land, and in such case separate ownership of the fixture apart from ownership in the land makes it the personal property of the owner, since necessarily it cannot be treated as a part of the land because of such divergence of ownership. Trees, for instance, when transferred by writing sufficient to satisfy the statute, to one who is not the owner of the land on which they stand, are his personal property. Nevertheless; they still remain trees and a part of the land as a matter of fact,⁵ and there is no reason why the term used to designate them should be changed because they have become personalty for the time being. So with fixtures which are attached in a permanent way so as to become part of the land if annexed by the owner in fee; there seems to be no good reason why they should not still be termed fixtures even though they do not become part of the land because their ownership as chattels is in some person other than the owner of the land. Therefore chattels attached to the land by the owner in fee, who acquires them under a contract of conditional sale, or who gives a chattel mortgage thereon, to secure the purchase price, are properly termed fixtures if annexed in such a way that they would have become part of the land in the absence of such chattel mortgage or contract of conditional sale, although they continue to be personalty because title to them, as chattels, remains in the vendor by the terms of the contract of conditional sale or chattel mortgage.⁶ In the same way, annexations made by a tenant for years or for life, which in most cases remain the personal property of the tenant during his term, may properly be classed as fixtures in all cases where the annexation is of such a nature that the chattels would have

3. See § 9, *ante*, and cases cited thereunder.

4. See §§ 46 to 59, *post*.

5. See § 11, note 9, *ante*.

6. See, for full treatment of this question, §§ 46-59, *post*.

become a part of the land if annexed by the owner in fee. Fixtures annexed by tenants remain their personal property because they do not intend to permanently improve the property for the benefit of the landlord or remainderman, but only for their own benefit during the term. Such fixtures are annexed in the same way as though annexed by the absolute owner, and they are just as much ostensibly a part of the land in the one case as in the other. They are prevented from becoming a part of the land because of the tenant's ownership of them as chattels. Any definition of fixtures which excludes them would be manifestly incomplete, as a very considerable part of the law of fixtures has to do with them. Furthermore, the courts have uniformly called them fixtures, which is also the general usage.⁷

Therefore fixtures include (a) chattels annexed to land permanently by the owner in fee; (b) chattels annexed in the same permanent way under an agreement that title to them as chattels is to remain in a third person; (c) chattels annexed in the same permanent way by tenants for years or for life and removable during the term. In the first case they become part of the land and are called real fixtures; in the two latter cases they remain chattels and are called chattel fixtures.

§ 38. Fixtures Annexed by Owner in Fee.—Excluding for the time being annexations made by tenants for life or for years, and taking up for detailed consideration fixtures annexed by the owner in fee, by what tests are we to determine whether a chattel has been permanently annexed so as to become a fixture? There must always, of course, be annexation.⁸ Whether or not there is physical annexation is a question of fact, in determining which there is not much difficulty. The difficult problems arise in determin-

7. See §§ 52-59, *post*, for treatment of fixtures annexed by tenants for life or for years.

8. See § 39, "What Amounts to Annexation," *post*.

ing whether or not there is permanency of annexation sufficient to change the actual or ostensible character of the property from personalty to realty. In determining this question the law applies the test of the intent with which the annexation was made. If the owner intended to annex the chattel permanently, as a permanent improvement of his land, for use thereon for all time, or until the thing attached be worn out or antiquated, or the land be diverted to some other use, then it is a fixture. The owner's intent must be determined from the facts and surrounding circumstances under which the annexation was made. Any fact or circumstance accompanying the annexation which will tend to throw light on the purpose or intention of the owner in making the annexation, should be considered in determining his intent. If, in view of such facts and circumstances, the average man would be held to have intended to annex the chattel as a permanent improvement on the land, then it is a fixture and becomes a part of the land. The secret, unexpressed intent of the owner is immaterial. In determining this question of intent, the courts lay stress on two tests: 1st, the nature of the annexation, whether permanent or merely transient, and 2nd, the adaptability of the chattel to the land to which it is annexed; whether or not it is adaptable for use in connection with the permanent use to which the premises have been appropriated. The nature of the annexation has, of course, some bearing on the matter of intent, but the important and usually controlling test is whether or not the chattel attached is adaptable to some permanent use in connection with the land as a part thereof. If it is, then the inference is clear that the owner, having annexed it for permanent use in connection with the land, intended to attach it permanently as a part of the freehold. A detailed consideration of these tests can be best taken up only in connection with a consideration of the cases, which will follow.⁹

⁹. See §§. 42-45, *post*, and cases cited and discussed therein.

§ 39. **What Amounts to Annexation.**—A fixture must be annexed to the land of which it is a part, and it is immaterial what form the annexation may take, except as bearing on the question of intent. Whether it be fastened with nails or screws or by any other means, or merely rest in position of its own weight, there is actual physical annexation and the article so annexed is a fixture if annexed with the intention of making it a permanent part of the freehold.¹⁰ Therefore, where a large statue was placed in a pedestal built in a permanent way expressly to receive it, the statue was held to be sufficiently attached though it was not fastened in any way and was held in position simply by the force of gravity.¹ There must, however, be annexation to some definite piece of land. Utensils or implements used in connection with a manufacturing plant are not annexed to it. They are on the premises for use wherever they may be required, but they have no definite situs; they are still movables, and therefore chattels.² The rolling stock of a railroad, including the cars, engines, etc., are not fixtures for the same reason.³ They are made for use, it is true, upon the road-bed, but even when in use they cannot be regarded as annexed thereto; they are not identified with any parcel of land as a part thereof. They are not

10. *Williamson v. N. J. S. R. Co.*, 29 N. J. Eq. 311; *Walker v. Sherman*, 20 Wend. (N. Y.) 656; *Teaff v. Hewitt*, 1 Ohio St. 511, and cases cited and discussed under this topic, since every case involving fixtures holds that there must be annexation, actual or constructive.

1. *Snedeker v. Waring*, 12 N. Y. 170.

2. *Dudley v. Hurst*, 67 Md. 44; *Walker v. Sherman*, 20 Wend. (N. Y.) 636; *Farrar v. Stackpole*, 6 Me. 154; *Hoyle v. Plattsburgh, etc. R. Co.*, 54 N. Y. 314; *Wolford v. Baxter*, 33 Minn. 18; *Despatch Line, etc. v. Bel-*

lamy Mfg. Co., 12 N. H. 205; *Winslow v. Bromich*, 54 Kan. 300; *Sampson v. Graham*, 96 Pa. St. 405; *Atlantic Safe Dep. Co. v. Atl. City L. Co.*, 64 N. J. Eq. 140.

3. *Williamson v. N. J. S. R. Co.*, 29 N. J. Eq. 311; *Randall v. Ewell*, 52 N. Y. 521; *Hoyle v. Plattsburgh & Mont. R. Co.*, 54 N. Y. 314; *Nelson v. I. E. R. Co.*, 51 Iowa 184; *Chicago & N. W. R. Co. v. Borough of Ft. Howard*, 21 Wis. 45; *Coe v. Col. Pq. & Ind. R. Co.*, 10 Ohio St. 372, 379; *Boston, etc. R. Co. v. Gilmore*, 37 N. H. 110; *State v. Martin*, 141 N. C. 832.

part of any specific portion of the roadbed, and it is impossible to treat them as part of the entire roadbed, since they are used not only on the tracks of the company to which they belong, but also on other tracks. While in use on some other railroad, perhaps thousands of miles from the home tracks, it would be absurd to regard them as part of the roadbed of the railroad. Some cases have held to the contrary, but these cases cannot be supported on principle, nor do they now represent the law in any state.⁴ There is no annexation in such case, either actual or constructive, since there is no localization in use. They are not a part of any definite and specific piece of land, and are therefore mere movable chattels.

§ 40. Constructive Annexation.— When a fixture, actually attached to the land in a permanent way, is temporarily removed for the purpose of repair, or for any other temporary purpose, or in the ordinary course of its use in connection with the land, but without any intention of severing it permanently, or of changing its character to personalty, it remains a part of the land while so removed.⁵ As we

4. *Titus v. Ginheimer*, 27 Ill. 462; but see *Const. of Ill. Art. 11, § 10*, which provides that rolling stock "shall be considered personal property."

In some cases, such as *Minn. Co. v. St. Paul. Co.*, 69 U. S. 209, and *State v. Nor. R. Co.*, 18 Md. 193, statements are made to the effect that rolling stock are fixtures, but these are *dicta*, since the question was not necessarily involved.

Cases cited for the proposition that rolling stock is realty are discussed in *Neilson v. Iowa E. R. Co.*, 51 Iowa 184, and the court points out that they generally turn on some other question. It may be taken as settled,

as a result of statutes and decisions, that rolling stock is personal property in all the states.

It may, however, be mortgaged with the road bed, and such mortgage, by statutory provision, need not be filed as chattel mortgage, in New York and New Jersey and some other states. See cases in preceding note, *Laws of N. Y.*, 1868, ch. 709.

5. *Williamson v. N. J. S. R. Co.*, 29 N. J. Eq. 311; *Congr. Society v. Fleming*, 11 Iowa 533 (in which case a bell taken from tower of old church when demolished, and kept on the premises to be put in tower of new church, was held to remain part of the land throughout); *Heaton v.*

have already seen, that which is realty remains part of the land until severed permanently with the intention of changing its character and making it personalty.⁶ Fixtures while temporarily detached are said to be constructively annexed. In fact they have been actually annexed, and remain real property because not severed permanently with the intent of making them chattels. Where, for instance, a mill stone was removed for repair, the intention being to restore it to its original place in the mill, it passed by a deed conveying the mill.⁷ Keys of a house, fitted to the doors as part of it, are part of the house, though most of the time in the owner's pocket. They were originally fitted and annexed to the doors, and are removed only in the regular course of their use in connection with the house.⁸ Hop poles, used for the purpose of growing hops, and attached in the land to support the vines during the growing season, remain part of the land, though severed, during the winter, and stowed away for use in a similar way the following year. Having become fixtures by annexation, such severance in no way changes their character.⁹ Storm doors and windows, shutters or blinds, awnings, etc., if fitted to a house for permanent use as part of it, remain fixtures and part of the house though detached and stored away during part of the year when not required for use.¹⁰ In all such cases the article

Findlay, 12 Pa. St. 304 (where cylinder was removed and sold, but shortly after restored to its original position, it was still subject to a lien on the land existing before its removal); Lewis v. Rosler, 16 W. Va. 333 (copper and brass fixtures removed from a salt works for safe keeping).

6. See §§ 9 and 10, *ante*.

7. *Wystow's Case*, 14 Henry VIII, 25b.

8. *Liford's Case*, 11 Coke, 50b; *Bishop v. Elliott*, 11 Exch. 113.

9. *Bishop v. Bishop*, 11 N. Y. 123.

10. *Hill v. Wentworth*, 28 Vt. 436 (in which case it was held that where blinds and storm windows had never been fitted or fastened to the house, they remained chattels); *State v. Elliott*, 11 N. H. 540; *Fish Co. v. Young*, 127 Wis. 149 (window screens); *Roderick v. Sanborn*, 106 Me. 159; *Cosgrove v. Troischer*, 62 App. Div. (N. Y.) 123 (awnings—whether realty or not depending on whether specially made and fitted and annexed. They were detached at time of the suit).

is said to be constructively annexed while temporarily removed. In fact, such removal is in no true sense a severance from the freehold; it is incident to the use of the fixtures in question as permanent parts of the house.¹

Fence rails or boards, when blown off, or removed from the fence with the intention of using them on the same premises for repairing or rebuilding the same or some other fence, remain real property while so removed, and pass with the land as part of it. They have not been removed with the intention of changing them to chattels.² Field stones or stones from a wall gathered for use on another part of the same premises, for the purpose of reannexing them to the same parcel of land as part thereof, remain real property during the process, though they would become personalty if taken from their original place for the purpose of use elsewhere, since in the first case there would be no intent of permanently severing them, while in the latter case such intent would necessarily exist.³ In the case of trees cut down and converted into rails, or boards, or lumber of any kind for the purpose of building or repairing fences or buildings on the same premises, it has been stated that such rails or timber remain part of the land before reannexation, so as to pass therewith under a deed of conveyance.⁴ The cases, however, do not bear out this proposition, and the better view would seem to be that such rails or lumber cut from trees on the same premises to which reannexation is to be made, become and remain personalty until so reannexed. Such rails or boards or sticks of timber are personal property in their nature, with all

1. Other cases illustrating the same principle are *Tolles v. Winton*, 63 Conn. 440; *Burnside v. Twitchell*, 43 N. H. 390; *Wadleigh v. Janvrin*, 41 N. H. 503.

For a good discussion of this question, see *Williamson v. N. J. S. R. Co.*, 29 N. J. Eq. 311.

2. *Goodrich v. Jones*, 2 Hill (N. Y.) 142; *Harris v. Scovel*, 85 Mich. 32; *McLoughlin v. Johnson*, 46 Ill. 163.

3. *Noble v. Sylvester*, 42 Vt. 146.

4. *Washburn R. P.* § 25.

the attributes thereof. There is no intent to restore the trees as such to the land. The trees have been changed from part of the land into a commodity, an article of commerce with all the characteristics of personalty, and they become part of the land again only when re-annexed. This seems to be the prevailing view under the cases.⁵

§ 41. **Other Cases of Constructive Annexation.**— Another class of cases of fixtures said to be constructively annexed are parts of machinery or appliances used habitually as essential parts of the permanent machines or other equipment of manufacturing plants, or things personal of any kind actually appropriated to permanent use in connection with the land, though there be no permanent attachment to any specific part of the premises in question. The rolls of an iron rolling mill, of varying sizes, for use in the rolling machines, as they may be required, but kept in reserve until needed, are as much a part of the machines while not attached as the rolls actually in position. So, also, extra rolls kept in reserve to take the place of those in use, in case of emergency, are part of the machines, and therefore part of the freehold.⁶ Rails distributed obviously for the pur-

5. *Cook v. Whiting*, 16 Ill. 480 (in which case hewed timbers, posts and a round log, severed from the same premises and lying loose on the ground intended for the purpose of erecting a granary, were held to be personalty); *Wincher v. Schrewsbury*, 2 Scam. R. 283 (where rails cut by one having no title were held to be personal property when piled on the land, and did not pass with the land); *Clark v. Burnside*, 15 Ill. 62 (holding that rails in fence were realty, while rails stacked on the ground were personalty).

See, also, *Conklin v. Parsons*, 2 Pinney (Wis.) 264, and *Ripley v.*

Page, 12 Vt. 353, where it was held that rails distributed along obviously for the purpose of a fence were part of the land because appropriated to the land by being so distributed. If cut on the same land, it follows that they were personal before being so distributed. See, also, *Wing v. Gray*, 36 Vt. 261; *Carkin v. Babbitt*, 58 N. H. 579; *Robertson v. Phillips*, 3 Greene (Ia.) 220.

6. *Voorhis v. Freeman*, 2 Watts & Searg. 116; *Farrar v. Stackpole*, 6 Me. 154; *D. L. & W. R. Co. v. Oxford Iron Co.*, 36 N. J. Eq. 452; *Pierce v. Goddard*, 108 Mass. 78; *Ex parte Astbury*, L. R. 4 Ch. App. 630.

pose of repairing or building a fence have been held so far appropriated to the fence as to become part of the land.⁷ In these cases there is annexation of a permanent kind, and as a matter of fact the rolls or other parts of machinery are brought on the premises and are assigned a permanent use in connection with the machines which makes them part thereof. This annexation is constructive only in the sense that they are not fastened in any way to any fixed part of the premises. The fence rail cases above referred to can be justified only by regarding the rails as sufficiently appropriated to the fence as to become a part thereof. It is well settled that where building material for buildings or a stone for a door-step, in fact any article intended for permanent annexation, are brought upon the premises they do not become part of the land until actually placed in the position which they are to occupy permanently.⁸ In one case where heavy spike machines, weighing several tons, were made to order and shipped to a manufacturing plant, where stone foundations had been prepared for them, were levied upon as personalty after they had been brought on the premises but before they were placed in position, it was held that they had become part of the realty and that the levy was therefore void.⁹ It is difficult to find a principle

7. *Ripley v. Paige*, 12 Vt. 353; *Conklin v. Parsons*, 2 Pinney (Wis.) 264; *Hackett v. Amaden*, 57 Vt. 432.

8. *Woodman v. Pease*, 17 N. H. 282; *Carkin v. Babbitt*, 58 N. H. 579; *Cook v. Whiting*, 16 Ill. 480; *Johnson v. Mehaffy*, 43 Pa. St. 308 (rolls for rolling mill, never attached, and left on premises in a rough state, remained personalty, though brought on the premises for the purpose of the mill); *Spruhen v. Stout*, 52 Wis. 517 (tubs brought on premises, but not attached did not become part of realty, but might be included under mechanic's lien).

In *Byrne v. Werner*, 138 Mich. 328, the court held that structural iron and cut stone, prepared and fitted for use in the completion of a building, brought on the premises and on an adjoining lot ready to be placed in the building, were personal property, but nevertheless passed with the land as chattels, under the peculiar facts of the case. See, also, *First Com. & Sav. B. v. Milling Co.*, 144 Mich. 188, holding that machines brought on premises, but not annexed, though intended to be, were chattels.

9. *McFadden v. Crawford*, 36 W. Va. 671. See *Rahm v. Domayer*, 137

on which this case can be supported. It is hard to see how the mere bringing of the machines on the premises can be said to have made them a part thereof any more than in the case of the stone for the door-step, or the cases of building material brought on the premises for a building. The machines had not reached the places where they were to be placed permanently, and in fact were not annexed at all. The doctrine of constructive annexation has no application to such a case.

§ 42. Application of the Test of Intent.—Having determined that the chattel has been affixed to the land by either actual or constructive annexation, the permanency of such annexation, which is essential to convert the chattel into a fixture, is determined by applying the test of the intent with which the owner made the annexation. If all the facts and circumstances under which the annexation was made are sufficient to establish that the average man under the same circumstances would have intended to annex the chattel as a permanent accession to the freehold, then the law declares the annexation to be permanent, and the chattel annexed a fixture.¹⁰ The secret unexpressed intent of the owner is immaterial, as it furnishes no general test of permanency.¹ Parol statements, made at the time of annexa-

Iowa 18, holding that doors, transoms and other prepared finishing trim, made to order for building in course of erection became realty when brought on the premises though not attached.

10. *Hopewell Mills v. Tauton Savings Bank*, 150 Mass. 519; *Snedeker v. Waring*, 12 N. Y. 170; *Voorhis v. Freeman*, 2 W. & S. (Pa.) 116; *Potter v. Cromwell*, 40 N. Y. 287; *McRea v. Central Nat. Bank*, 66 N. Y. 489; *Ottuman Woolen M. Co. v. Hawley*, 44 Iowa 57, and cases

cited and discussed in the sections and notes immediately following.

1. *Snedeker v. Waring*, 12 N. Y. 170; *Nat. B. of Catasauqua v. North*, 160 Pa. St. 303, 308; *Rogers v. Brokaw*, 25 N. J. Eq. 496; *Fifield v. Farmers' Nat. Bank*, 47 Ill. App. 118, *affirmed* 148 Ill. 163; *Kendall v. Hathaway*, 67 Vt. 122; *Thompson v. Smith*, 111 Iowa 718; *Hayford v. Wentworth*, 97 Me. 347; *Young v. Hatch*, 99 Me. 465; *State Sec. Bank v. Hoskins*, 130 Iowa 339; *People v. Jones*, 120 Mich. 283.

tion, while admissible as throwing light on the actual intent and purpose of the annexation, are by no means controlling.² The question must be determined from the facts and circumstances under which the annexation was made, and the uses for which the chattel was intended in connection with the use of the land.³

§ 43. Intent as Shown by Character of Annexation and Adaptability for Use with the Land.—The way in which the annexation is made, and the adaptability of the thing attached to the uses and purpose for which the freehold has been given over, are important only as tending to establish the intent of the owner, as an average man, in annexing the chattel. If it is annexed in such way that it is not easily removable, the intention of making it a permanent part of

In *Hopewell Mills v. Tauton Sav. B.*, 160 Mass. 519, holding that looms in a cotton mill, placed there apparently for permanent use, were fixtures, the court said: "A machine placed in a building is found to be real estate or personal property from the external indications which show whether or not it belongs to the building as an article designed to become a part of it, and to be used with it to promote the object for which it was erected, or to which it has been adapted or devoted—an article intended not to be taken out and used elsewhere unless by reason of some unexpected change in the use of the building itself. The tendency of the modern cases is to make this a question of what was the intention with which the machine was put in place * * * (citing cases). These cases seem to recognize the true principle on which the decisions should rest, only it should be noted that the intention to be sought is not the un-

disclosed purpose of the actor, but the intention implied and manifested by his act. It is an intention which settles, not merely his own rights, but the rights of others who have or who may acquire interests in the property. They cannot know his secret purpose, and their rights depend not upon that but from the inferences to be drawn from what is external and visible."

The court found that the machinery was put in to remain until worn out, or until for some unforeseen cause, the character of the real estate should be changed or put to different use.

2. *McRea v. Central Nat. Bank*, 66 N. Y. 489; *Linahan v. Barr*, 41 Conn. 471; *Benedict v. Marsh*, 127 Pa. St. 309 (statements of owner who erected saw mill that he intended to move it and use it in sawing timber of three different woodlots admitted); *Nelson v. Howison*, 122 Ala. 573.

3. Cases cited in last three preceding notes.

the land is indicated; on the other hand, if the attachment be slight, or only by mere weight, that will be some evidence of a contrary intent. The important and usually controlling test of intent is, however, the chattel's adaptability for permanent use in connection with the land, for if it is adaptable for use permanently as a part of the equipment of the premises, and incident to the permanent use to which the land has been appropriated, it was unquestionably annexed to remain for all time or until worn out as a fixed part of the establishment. The best way of considering these tests is by considering in some detail selected cases of characteristic classes which illustrate the principles above set forth. These cases involve a consideration of both tests of intent above referred to, and they will be considered as illustrating how intent may be established, not only by employing these tests, but also by considering all the facts and circumstances connected with the annexation and uses of the chattel which throw light on this question of intent. It will be found that practically all of such facts and circumstances will fall naturally into one or the other group, either as showing the nature of the annexation, or as indicating the adaptability of the thing annexed in connection with the permanent use of the land.

§ 44. Specific Illustrative cases—Machinery.—Where a parcel of land has been appropriated to the purposes of a manufacturing establishment of a permanent kind, such as cotton and woolen mills, steel and iron mills, grist mills, and the like, machines used therein as permanent parts of the mill, and forming necessary parts of its equipment, are fixtures.⁴ Essential parts of such machines such as rolls of

4. *Hopewell Mills v. Tauton Sav. B.*, 150 Mass. 519 (looms in cotton mill, and beams on which they rest, though temporarily removed); *McRea v. Cent. Nat. B.*, 66 N. Y. 489 (machines in paper mill); *Potter v. Cromwell*, 40 N. Y. 287 (grist mill); *D. L. & W. R. Co. v. Oxford Iron Co.*, 36 N. J. Eq. 452 (machinery and belting of a factory); *Feder v. Van Win-*

varying sizes used for different purposes as required in the machines of a rolling mill, are included as part of the land, as are duplicates kept on hand for use in case of breakage.⁵ Such machines and parts of machines are annexed with the intention of using them permanently as part of the establishment, and this is true even though the attachment be very slight, and even where the parts are kept in reserve on the premises, and attached only when in use. As stated in a case covering iron rolls in a rolling mill,⁶ "Nothing but a passive regard for old notions could have led them (the courts) to treat machinery as personal property when it was palpably an integrant part of a manufactory or a mill, merely because it might be unscrewed or unstrapped, taken to pieces and removed without injury to the building. It would be difficult to point out any sort of machinery, however complex in its structure, or by what means soever held in its place, which might not with care and trouble be taken to pieces and removed in the same way." The character of the annexation is of little moment where it appears that the machine was annexed as a permanent and essential part of the mill or factory. Whether it may be easily removed and used in a similar establish-

kle, 53 N. J. Eq. 370 (machinery in iron works. The court said the use need not necessarily be intended to be perpetual, merely that the chattels be incorporated for use to which the realty is appropriated); Knickerbocker Trust Co. v. Penn Cordage Co., 66 N. J. Eq. 305; Benedict v. Marsh, 127 Pa. St. 309; Hendy v. Dinkershoff, 57 Cal. 3; Lavenson v. Standard Soap Co., 80 Cal. 245 (machinery of soap factory); Fifield v. Bank, 148 Ill. 163; Ottumwa Woolen Mill Co. v. Hawley, 44 Iowa 57; Parsons v. Copeland, 38 Me. 537; Hunels v. Higman, 145 Ala. 215; State Sec. B. v. Hoskins, 130 Iowa 339; Dhring v.

Beck, 146 Mich. 706 (machinery of a brewery).

5. Voorhis v. Freeman, 2 W. & S. (Pa.) 116; D. L. & W. R. Co. v. Oxford Iron Co., 36 N. J. Eq. 452 (duplicate cylinders kept for emergency but never used held to be fixtures); Pierce v. George, 108 Mass. 78 (detachable wheels of polishing machines held to be realty); Dudley v. Hurst, 67 Md. 44 (crates, chaffing machines, wash tables, etc., essentially necessary to the working of the principal machinery, classed as part of the realty).

6. Voorhis v. Freeman, 2 W. & S. (Pa.) 116.

ment elsewhere is also immaterial in such a case. It was annexed for permanent use as a part of the plant where affixed, not to be removed and not to be used elsewhere. The intention to annex it permanently as part of the land is conclusively established from its adaptability for use as a permanent accession to the freehold in connection with the permanent use to which the land is given over.⁷

In New York it has been held that looms annexed to a woolen mill by being fastened to the floor by screws, and operated by the power by which the other machinery was operated, being connected with the permanent shafting by belts, was personal property nevertheless, because the looms could easily be removed and used in any other mill where power might be applied without material loss in their value.⁸ This decision, by a divided court, is not in accord with the rule generally prevailing, and is also inconsistent with cases decided both before and after it in New York. In *Walker v. Sherman*,⁹ a leading case in the United States, the court held that mere loose, movable machines not shown to have any connection with the plant, were personal property, but the court makes it clear that if they were connected by bands and operated by the same power, so as to constitute part of the factory, they would be fixtures. In *Potter v. Cromwell*¹⁰ the court held that a port-

7. See cases cited under note 4 immediately preceding, particularly *Hopewell Mills v. Tauton Sav. B.*, 150 Mass. 519; *D. L. & W. R. Co. v. Oxford Iron Co.*, 36 N. J. Eq. 452; *Feder v. Van Winkle*, 53 N. J. Eq. 370; *Parsons v. Copeland*, 38 Me. 537; *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa 57; and *Voorhis v. Freeman*, *supra*.

8. *Murdock v. Gifford*, 18 N. Y. 28. 9. 20 Wend. (N. Y.) 636. The court said: "I am not prepared to deny that a machine movable in itself

would become a fixture from being connected in its operation by bands, or in any other way, with the permanent machinery, though it might be detached, and restored to its ordinary place, as easily as the chain in *Farrar v. Stackpole*, I think it would be a fixture notwithstanding."

10. 40 N. Y. 287. The court quotes with approval *Shaw, J.*, in *Winslow v. Ins. Co.*, 4 Met. 306: "In general terms we think it may be said that when a building is erected as a mill, and the water works or steam works

able grist mill, annexed to a tannery building under circumstances disclosing an intent to use it as a permanent custom and grist mill for the neighborhood, became part of the land. The court distinguished the loom case on the ground that it was found as a matter of fact that the looms in that case were not attached for the purpose of rendering them part of the building, but merely to hold them in position. In another later case the New York court again fell in line with the rule generally prevailing, holding that machines in a twine factory which constituted part of the factory, were fixtures.¹ In these cases, the controlling con-

which are relied upon to move the mill are erected at the same time, and the works to be driven by it are essential parts of the mill, adapted to be used in it and with it though not at the time of the conveyance or mortgage attached to the mill, are yet parts of it and pass with it by a conveyance, mortgage or attachment."

1. *McRea v. Cent. Nat. B.*, 66 N. Y. 489. All cases agree that the engine and boiler or water wheel and equipment by which power is generated and applied in a mill are fixtures. A few cases which apparently express the rule prevailing in the jurisdictions where they were decided, hold that machines not fastened in a permanent way, but fastened only by screws or cleats, or only by bands through which power is applied, merely to hold them in position, or to apply the power, are chattels though forming part of the equipment of a factory or mill. The line seems to be drawn at the belts or bands connecting them with the permanent shafting. Such cases are *Teaff v. Hewitt*, 1 Ohio St. 511, holding that looms, carding and spinning machines of a woolen factory were chattels, because

easily removed and adaptable for use elsewhere; *Hill v. Wentworth*, 28 Vt. 428, holding that permanent machinery of a paper mill were personality for a like reason; *Harris v. Hayes*, 34 Vt. 220, which followed the preceding case. In *Shepard v. Blossom*, 66 Minn. 421, following the general rule that machines fastened by cleats, screws, bolts, etc., or by their own weight in the case of ponderous machines, are fixtures, refuses to extend the rule to cover light machines not fastened in any way except by attachment to the belts, etc., irrespective of whether they are an essential part of the factory or not, holding them to be chattels.

These cases, except the last, are discussed in many of the cases cited heretofore under this topic, notably in *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa 57; *Parsons v. Copeland*, 38 Me. 537, and in these cases as well as in the other cases cited in notes 4 and 7, immediately preceding, it is made very clear that essential machines placed in a mill as part of it are as truly a part of the realty as the engine, water wheel, etc., since they are annexed with the intention

sideration was the adaptability of the machinery to the factory as a permanent and essential part of it, as showing an intent of making the machinery part of the freehold.

When a machine has no definite or fixed location in use by attachment or by connection with an attached machine, so that it is a mere utensil or tool, it is necessarily personal property, no matter how essential it may be in the business of the factory or plant. Such articles are used merely in connection with the land and buildings, not as part thereof. This applies to mere movable utensils and tools used on farms, in dwellings, or in connection with lands or buildings of any kind, whether appropriated to manufacturing or not.²

§ 45. House Fixtures, Gas Fixtures, Furnaces, Ranges, Refrigerators, Awnings, Etc.—Ornamental mantels, fireplaces, hat-racks, mirrors and similar things, annexed to a house as part of it, completing the interior finish of the house, are fixtures. They are adapted and fitted to the house for permanent use as part of it. They go to the completion of the house. Their adaptability for permanent use as part of the house shows conclusively that they were annexed, with the intent to make them fixtures.³ Here also

of maintaining them permanently as part of the plant, until used up or until the land be appropriated, on some unforeseen contingency, to a different use. See *Hubbell v. East Cambridge Bank*, 132 Mass. 447, holding that loose machinery, not clearly established to be a permanent part of the plant, were chattels. See, also, *Crain Iron Works v. Wilkes*, 64 N. J. L. 193.

2. See cases cited in note 2 under § 39.

3. See cases discussed in text; also *Fratt v. Whittier*, 58 Cal. 126 (kitchen range with boiler, patent

water filter, tanks and mosquito screens, held to be fixtures of hotel building; *Peck v. Batchelder*, 40 Vt. 233 (blinds and storm windows, personalty because not fitted or attached); *Fish Co. v. Young*, 127 Wis. 149 (window screens); *Bamway v. Cobb*, 99 Mass. 457 (stoves, sink in house).

Water closets, bath tubs, wash basins, wash tubs, etc., are fixtures; *Smyth v. Sturges*, 108 N. Y. 495; *Hayford v. Wentworth*, 97 Me. 347; *Munroe v. Armstrong*, 179 Mass. 165.

the character of the annexation is of little moment. Even though easily removed and capable of use elsewhere, nevertheless they are fixtures if essential to the completeness of the dwelling to which they are attached. They were annexed to remain, not to be taken away and used somewhere else. For instance, where mirrors and hall-racks were placed in houses in vacant spaces in the walls of hall and parlor left to receive them, so that their removal would leave unfinished places in the inner walls, the court held that they were unquestionably annexed to remain as part of the houses, and were therefore fixtures, in spite of the fact that they could readily be removed since they were fastened only with hooks and screws. They were not mere furniture, but part of the houses.⁴ In another case, where mirrors were put in after the house was completed, being fastened in much the same way by hooks and screws, and easily removable, it was held that they were mere furniture, since they formed no part of the building, as their removal would leave the house as complete as before.⁵

Gas pipes are uniformly held to be part of the realty to which they are annexed, but chandeliers and gas fixtures screwed on such pipes for the purpose of using the gas for lighting or heating purposes are treated as personal property. The leading case in the United States on this point is based on the analogy of lamps, candlesticks, etc., used with oil or candles, which are, of course, chattels. The court held that gas fixtures were of the same nature, capable of being removed and taken elsewhere, for use in any house fitted with gas pipes, and therefore may be removed by a vendor of a house, as part of his furniture.⁶ The rule in this case has been followed generally, and has been extended

4. *Ward v. Kilpatrick*, 85 N. Y. 413; *Spinney v. Barbe*, 43 Ill. App. 585 (mirrors firmly attached, would injure walls seriously to remove them). *Co.*, 81 N. Y. 38. *Cranston v. Beck*, 70 N. J. L. 145 (annexed firmly but easily removed without damage. Not essential to finish of the house).

5. *McKeage v. Hanover Fire Ins. St.* 522. 6. *Vaughen v. Haldeman*, 33 Pa.

to include gas ranges in residences and apartment houses.⁷ As a matter of fact, gas fixtures are treated by vendors and purchasers as part of the building to which they are annexed, passing as personal property by delivery on the transfer of the land.⁸ They are undoubtedly put in for permanent use as part of the house to which they are attached. The gas piping is of no value without them, and the houses in which they are used are left unfinished if they are taken away. These cases are to be explained as being based on a mistaken analogy to lamps and candleabra, before the permanent nature of the use of gas in connection with buildings was thoroughly understood. Hall carpets, window shades, curtain poles and ash cans are held to be personal property in all cases as a matter of law.⁹ Whether

7. *Jarechi v. Philharmonic Soc.*, 79 Pa. St. 403; *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y. 38; *Central Union Gas Co. v. Browning*, 210 N. Y. 10 (gas ranges); *Manning v. Ogden*, 70 Hun (N. Y.) 399; *Cosgrove v. Troescher*, 62 App. Div. (N. Y.) 123 (gas fixtures and ranges in apartment house); *Towne v. Fiske*, 127 Mass. 125. In *Capehart v. Foster*, 61 Minn. 132, the prevailing view is followed, but reluctantly, the court holding that it is purely arbitrary and refusing to extend it to steam radiators.

8. *McKeage v. Hanover Fire Ins. Co.*, 81 N. Y. 38.

In *Fratt v. Whittier*, 58 Cal. 126, after carefully considering the cases holding gas fixtures to be chattels, the court refused to follow them as being out of accord with the well settled principles governing fixtures, and held that the gas fixtures of a hotel passed with it as part thereof. In *Canning v. Owen*, 22 R. I. 624, the court also refused to follow the gen-

eral rule, and held that the electric light fixtures of a hotel were fixtures. In *Jackson v. Wiseman*, 4 Meto. (Ky.) 357, and *Smith v. Commonwealth*, 14 Bush 31, the same result was reached.

In *Keeler v. Keeler*, 31 N. J. Eq. 181, a gas generator, pipes and burners, used to supply light for a mill, were held to be real property, the entire lighting plant being on the mill premises. See also *Frank v. Brigaldi*, 4 Daly 359. *Security Trust Co. v. Temple Co.*, 67 N. J. Eq. 514, repudiates the general rule also. In *Hook v. Bolton*, 199 Mass. 244, the court held that whether gas fixtures were part of the realty or not should be submitted to the jury as a question of fact, depending on the intent of the annexor. The court says that if gas stoves or window shades are proved to have been annexed to an apartment house to go with it permanently they would be fixtures.

9. *Manning v. Ogden*, 70 Hun (N.

refrigerators, gas logs, drying frames on roof, coal ranges and awnings are real property or not must depend on whether they were annexed under circumstances establishing an intent to make them a part of the building. If made to order for the particular place used, and fitted in as a part of the interior finish, or in a permanent way, in the case of refrigerators, gas logs and coal ranges, or if fitted and used with the particular windows in the case of awnings, they are fixtures; but if they were of stock sizes, and kinds merely placed in the house for use in connection with it but not as part of it, they continue to be chattels.¹⁰ Furnaces and heaters, connected with pipes, the whole forming a permanent heating plant in the house, are part of the house, since they form an essential and permanent part of its equipment, and are therefore annexed with the intention of making them part of the house in a permanent way.¹ It has been held, by analogy to gas fixtures, that steam radiators, which may readily be unscrewed and removed, are chattels,² but this again is contrary to the general under-

Y.) 399; *Cosgrove v. Troescher*, 62 App. Div. (N. Y.) 123.

It is difficult to see why window shades, when made to order for the windows of a house and attached thereto, should not be treated as fixtures, just as awnings are under like conditions.

10. *Cosgrove v. Troescher*, 62 App. Div. (N. Y.) 123; *Hook v. Bolton*, 199 Mass. 244. In *Cunningham v. Seaboard Realty Co.*, 67 N. J. Eq. 210, window screens made to order were held to be part of the realty.

1. *Erdman v. Moore*, 58 N. J. L. 445; *Stockwell v. Campbell*, 39 Conn. 362; *Champ v. Thatcher Co.*, 75 Conn. 165; *Aldine Mfg. Co. v. Barnard*, 84 Mich. 632; *Kent v. Brown*, 59 N. H. 236 (furnace and pipes for heating and also cistern and pipes to

supply water to house were part of the land); *West v. Farmers Ins. Co.*, 117 Iowa 147 (furnace and also boiler and pipes attached to kitchen range for hot water); *Ridgeway Stove Co. v. Way*, 141 Mass. 557 (permanent furnace); *Gunderson v. Kennedy*, 104 Ill. App. 117; *Young v. Hatch*, 99 Me. 465; *Thielman v. Carr*, 75 Ill. 385; *Tuttle v. Robinson*, 33 N. H. 104; *Jermyn v. Hunter*, 93 App. Div. (N. Y.) 175.

In *Towne v. Fiske*, 127 Mass. 125, and *Rahway Sav. Inst. v. Baptist Church*, 36 N. J. Eq. 61, portable iron furnaces were held to be personalty. So, also, a Baltimore heater was held to be a chattel in *Harmony Bld. Assn. v. Berger*, 99 Pa. St. 320.

2. *Nat. B. of Catasangria v. North*, 160 Pa. St. 303.

standing and' out of accord with the principles governing fixtures as those principles have been applied in other cases. The best considered cases hold such radiators to be fixtures.³

§ 46. Annexation Under Contract of Conditional Sale or Chattel Mortgage.—When the owner or real property affixes a machine or other fixtures to his land or building, having purchased it under a contract of conditional sale, by the terms of which title to the fixture is to remain in the vendor until paid for, or in a like case, where he gives back a chattel mortgage on the fixture to secure the purchase price, in either case title to the fixture remains in the vendor until it is paid for. Therefore it is impossible to escape the conclusion that the fixture does not become part of the land. When the title to it is in someone other than the owner of the land, it cannot, as a matter of law, be treated as part of the land without arbitrarily disregarding the legal rights of the vendor or holder of the chattel mortgage. This is the true reason why such fixtures remain personal property.⁴ We have already seen that even trees, incorporated with the land more firmly than a fixture can be, become personal property when transferred separately by deed or writing sufficient to satisfy the statute of frauds to one who is not owner of the land in which they grow, he buying them for the purpose of removal, not with the intention of acquiring a permanent interest in the land.⁵ This is because it is impossible to treat them as part of the land when they are owned apart from it as distinct things. In any case where a fixture is annexed by a stranger with

3. *Capehart v. Foster*, 61 Minn. 132; *Pond Co. v. O'Connor*, 70 Minn. 266; *Keeler v. Keeler*, 31 N. J. Eq. 181; *mateer v. Robinson*, 60 N. J. L. 433; *Gen. Elec. Co. v. Transit Equip. Co.*, 57 N. J. Eq. 460; *Paine v. McDowell*, 71 Vt. 28.

4. *Hertzog v. Marx*, 202 N. Y. 1; *Mott v. Palmer*, 1 N. Y. 564; *Wickes v. Hill*, 115 Mich. 333; *Pal-*

5. See § 11, *ante*, and cases cited in note 9 thereunder.

the license and consent of the owner, the stranger retaining title therein, it does not become part of the land because of such severance of the title. For instance, where a fence was built on a farm by a person having no interest in the farm under an agreement that the fence was to remain his, it was held that the fence did not pass with the land to a subsequent purchaser of the farm without notice of such agreement.⁶ The reason generally given for the rule that fixtures attached under contract of conditional sale or chattel mortgage remain chattels is that the contract or chattel mortgage establishes the intent of the owner to annex them as chattels for the time being, but this is a very unsatisfactory reason, as in the majority of cases the fixture is annexed by the owner with the intention of making it a permanent part of the freehold. As we have seen, the intent that governs is the intent to be reasonably inferred from the facts and circumstances surrounding the annexation, including statements made at the time by the owner, tending to throw light upon the permanency of annexation. It does not depend at all upon his secret unexpressed intent, or upon intent expressed by words or writing which is clearly contrary to the intent to be inferred from the character of the annexation and the adaptability of the fixture for use in connection with the permanent use to which the land is appropriated.⁷ Suppose in any of the cases in the reports involving this question, that instead of a chattel mortgage or contract of conditional sale there were letters or other positive evidence of the owner's expressed intent at the time of annexation that fixtures of a permanent character should remain personal property. There isn't a doubt that they would be real property, nevertheless, and would be treated as such

6. *Mott v. Palmer*, 1 N. Y. 364. subsequent purchaser of the land
See *Rowland v. Anderson*, 33 Kan. without notice.
264, holding that title of owner of
7. See § 42, *ante*, and cases cited
fence could not be set up against a thereunder.

for all purposes. It is not the intent expressed by the contract or chattel mortgage which makes such fixtures personalty, but it is the title and ownership of the vendor which prevents them from becoming part of the land. Cases on this question fall into two classes which will be separately considered.

§ 47. Between Vendor Under Contract of Conditional Sale or Chattel Mortgage and Prior Mortgagee of Realty.—

It is well settled in nearly all jurisdictions that the chattel mortgage or contract of conditional sale is valid and enforceable against the fixture as a chattel as against a prior real estate mortgagee. The fixture does not become part of the land, in fact or law, since title to it is not in the owner of the land. He has only a right to redeem it from the chattel mortgage or contract of conditional sale. It therefore never comes under the lien of the real estate mortgage. The real estate mortgagee can claim no equity arising out of estoppel, since the fixture was not annexed when he accepted the land as security, and he was not misled in any way.⁸ The cases which hold to the contrary seem to be out of accord with the fundamental principles of ownership. They are based on the theory that annexation sufficient to make a thing part of the land in the absence of such contract or chattel mortgage necessarily makes it part of the land in any event.⁹ If these

8. *Tift v. Horton*, 53 N. Y. 377; *Binkley v. Forkner*, 117 Ind. 176; *Horn v. Ind. Nat. B.*, 125 Ind. 381; *Crippen v. Morrison*, 13 Mich. 23; *Wickes v. Hill*, 115 Mich. 333; *Cochran v. Flint*, 57 N. H. 514; *Gen. Elec. Co. v. Transit Equip. Co.*, 57 N. J. Eq. 460; *Campbell v. Roddy*, 44 N. J. Eq. 244; *Ellison v. Salem Coal, &c. Co.*, 43 Ill. App. 120; *Sword v. Low*, 122 Ill. 487; *Northwestern Life Ins. Co. v. George*, 77 Minn. 319; *Edwards,*

&c. Co. v. Bank, 57 Neb. 323; *Davenport v. Shants*, 43 Vt. 546; *Paine v. McDowell*, 71 Vt. 28.

Campbell v. Roddy, 44 N. J. Eq. 244, holds that a chattel mortgage creates only a lien in the mortgagee—that the fixtures become part of the realty, but the lien of the chattel mortgage will be protected so far as it does not diminish the security of the real estate mortgagee.

9. *Thompson v. Vinton*, 121 Mass.

cases are sound then it is impossible to have separate ownership, apart from the land, of trees, buildings or fixtures of any kind; mere annexation must result in loss of ownership. Aside from these cases it is well settled in these same states that there may be such separate ownership of trees and fixtures.¹⁰ Even though the real estate mortgagee be regarded as the owner of the land, possession by the mortgagor should be held to be subject to the usual incidents of such possession, including the right to annex fixtures the title to which is in strangers and which are subject to removal. These decisions result in the arbitrary divesting of the title and interest of the vendor or chattel mortgagee without any semblance of reason or principle therefor either legal or equitable.

139; *Clary v. Owen*, 15 Gray (Mass.) 522; *Hawkins v. Hersey*, 86 Me. 394; *Ekstrom v. Hall*, 90 Me. 186.

In *Clary v. Owen*, *supra*, the court says: "And we think it is not in the power of the mortgagor, by any agreement made with a third person after the execution of the mortgage, to give to such person the right to hold anything to be attached to the freehold, which as between mortgagor and mortgagee would become a part of the realty. The entry of the mortgagee would entitle him to the full enjoyment of the premises with all the additions and improvements," etc.

It is submitted that this places annexations made by a mortgagor in possession in the same class with those made by a trespasser. If title to the fixtures was in the mortgagor, it would, of course, become part of the realty, but since title is in the vendor of the fixture, it cannot become part of the land except by

estoppel, and there is no basis whatever for an estoppel.

When the prior mortgagee consents to the annexation knowing the facts, the chattel mortgage or conditional contract will be valid against him, *Barthelemew v. Mamilton*, 105 Mass. 239, and *Hawkins v. Hersey*, *supra*.

10. This is expressly admitted in *Clary v. Owen*, *supra*, when the court suggests that a person erecting a building on the land of the mortgagor, retaining title thereto, might maintain a bill to redeem. So, also, in *Wentworth v. Machine Co.*, 163 Mass. 28, and *Ridgeway Stove Co. v. Way*, 141 Mass. 557, which cases stand for the rule that a contract of conditional sale is good as against a subsequent purchaser or mortgagee with notice, though void as to such mortgagee or purchaser without notice, the title of the vendor in the fixture is expressly recognized. See also Maine and Mass. cases cited under § 50, annexations made by licensee.

§ 48. Same—As to Subsequent Purchasers and Mortgagees.—It is uniformly held that such chattel mortgage or contract of conditional sale is good as against subsequent mortgagees or purchasers of the land with notice. The fixtures are not part of the land sold or mortgaged and the purchaser or mortgagee knows it.¹ Strangely enough, this doctrine is accepted even in those jurisdictions holding that such contracts and chattel mortgages are void as to prior mortgagees, though there seems to be no reason why a prior mortgagee should be in a better position than a subsequent mortgagee with notice.² Where the subsequent purchaser or mortgagee parts with value and has no notice of the chattel mortgage or contract of conditional sale, it is held in some states that his position is no better, since he does not get title to the fixture in question, title being in the vendor under the contract or chattel mortgage, and therefore the doctrine that in the case of a purchaser for value without notice equity will not disturb the legal title which he has acquired, does not apply.³ In the majority of states, however, the better rule prevails, that he who has voluntarily permitted his property to be affixed to the land of another, so that it becomes ostensibly a part thereof, will be estopped from denying that it is part of the land as against a purchaser for value of the land without notice of the rights of such third person; he will not be permitted to establish

1. *Davis v. Bliss*, 187 N. Y. 77; *Ford v. Cobb*, 20 N. Y. 344; *Binkley v. Forkner*, 117 Ind. 182; *Sword v. Low*, 122 Ill. 487; *Burrill v. Wilcox L. Co.*, 65 Mich. 371; *Lansing Iron W. Co. v. Wilbur*, 111 Mich. 413; *Case Mfg. Co. v. Garven*, 45 Ohio St. 289; *Thompson v. Smith*, 111 Iowa 718; *Adams Co. v. Interstate Bld. Assn.*, 119 Ala. 97; *Coleman v.*

Lewis, 27 Pa. St. 291; *Eaves v. Estes*, 10 Kan. 314.

2. *Wentworth v. Machine Co.*, 163 Mass. 28; *Ridgway Stove Co. v. Way*, 141 Mass. 557.

3. *Mott v. Palmer*, 1 N. Y. 564; *Ford v. Cobb*, 20 N. Y. 344; *Warren v. Liddell*, 110 Ala. 232; *Adams Co. v. Interstate Bld. Assn.*, 119 Ala. 97; *Falaenam v. Reliance Steel Foundry Co.*, 74 N. J. Eq. 325.

his title to the fixture against one who bought the land in good faith believing and having a right to believe that the fixture was included in the purchase.⁴ It is manifest that fair dealing and the proper operation of the recording acts require such a rule. Generally the filing of a chattel mortgage or contract of conditional sale is not notice to such subsequent purchasers or mortgagees.⁵ In New York, however, contracts of conditional sale of fixtures must be filed and indexed against the land to which they are to be attached,⁶ and in New York City the same rule applies to chattel mortgages⁷ and they are void as to subsequent purchasers or mortgagees for value of the real property affected if not so filed, provided they have no actual notice thereof. A search of the title of the land will, therefore, disclose their existence. This seems to be the best solution of the difficulty, the rights both of the vendors of the fixtures and of subsequent purchasers or encumbrancers of the realty being fully protected.

IN New York and those states holding that such contracts and chattel mortgages are good even against subsequent purchasers or encumbrancers for value and without notice, the chattel mortgage or contract must be kept good by being filed and re-filed as required by statute. If it is not, then by the terms of the statute it is void as to a sub-

4. *Binkley v. Forkner*, 117 Ind. 176; *Wickes v. Hill*, 115 Mich. 333; *Watson v. Alberts*, 120 Mich. 508; *Case Mfg. Co. v. Garven*, 45 Ohio St. 289; *Fifield v. Farmers Nat. B.*, 148 Ill. 163; *Thompson v. Smith*, 111 Iowa 718; *Pierce v. George*, 108 Mass. 78; *Southbridge Sav. Bank v. Exeter Works*, 127 Mass. 542; *Ridgeway Stone Co. v. Way*, 141 Mass. 557; *McCrillis v. Cole*, 25 R. I. 156; *Davenport v. Shanta*, 43 Vt. 546; *Landon v. Platt*, 34 Conn. 517; *Robeke v. Baer*, 115 Mich. 333.

5. *Brennan v. Whitaker*. 15 Ohio

St. 446; *Case Mfg. Co. v. Garven*, 45 Ohio St. 289; *Tibbetts v. Horne*, 65 N. H. 242.

In some states the filing of a chattel mortgage or contract of conditional sale is notice under above rule, and subsequent purchasers will take subject thereto, irrespective of actual notice. *Sword v. Low*, 122 Ill. 487; *Burrill v. Wilcox L. Co.*, 65 Mich. 571; *Sowden v. Craig*, 26 Iowa 156.

6. N. Y. Lien Law, § 112, as amended by Laws of 1904, Ch. 698.

7. N. Y. Lien Law, § 93, as amended by Laws of 1902, Ch. 64.

sequent purchaser or encumbrancer of the fixture for value and without notice. A subsequent purchaser or encumbrancer of the land or building comes clearly within this provision, since he has a right to believe that he is buying the fixtures with the land. Therefore if such contract or chattel mortgage is not filed and re-filed it will be void as to such subsequent purchaser or mortgagee of the land who will become entitled to the fixture as though the contract or chattel mortgage did not exist.⁸

§ 49. Same—Chattels not Annexed as Fixtures, and Chattels Annexed So as to Lose Their Identity.—The foregoing rules have no application to chattel mortgages on furniture or tools or articles of any nature which do not become fixtures since they are not attached so as to become ostensibly a part of the land. To become fixtures they must be so annexed that in the absence of the chattel mortgage or contract of conditional sale they would become part of the realty.⁹

If the chattel is so attached to the land as to lose its separate identity and to become merged with the land as an essential part of it, a chattel mortgage or contract of conditional sale affecting it is void. It has ceased to exist as a separate thing and therefore is not a fixture but necessarily part of the land as a matter of fact. Soil taken from land and used to grade another parcel, or stone or building material used in erecting buildings of a permanent nature on the land, are illustrations. This also applies to machines and other chattels so annexed and used that their removal would work serious injury to the premises or would destroy or greatly diminish the value of the chattel. When so annexed chattels may be fairly said to have

⁸ *Kirk v. Crystal*, 118 App. Div. (N. Y.) 32; *McMillan v. Lehman*, 101 App. Div. 436; *N. Y. Inves. Co. v. Cosgrove*, 47 App. Div. 35. ⁹ *Case Mfg. Co. v. Garven*, 45 Ohio St. 288, and cases cited in preceding notes.

lost their identity, and a chattel mortgage or contract of conditional sale covering them is void.¹⁰

§ 50. Annexation Made by Trespasser or Licensee.—Buildings or fixtures of any kind annexed by a trespasser become part of the land if they would have done so had the owner annexed them. The trespasser, therefore, loses all right to them and cannot take them away as his personal property, since they are treated as though annexed by the owner.¹ If a building or other fixture be annexed by a stranger with the consent of the owner, the stranger being given the right to take it away, expressly or by implication, it remains his personal property and may be removed by him, subject to the same general rules governing subsequent purchasers and mortgagees which apply in the cases of chattel mortgages and contracts of conditional sale, and the right of removal will be implied from the license in the absence of facts showing a contrary intent.² Of course, where such licensee is not given the right to remove the fixture, but is to leave it on the land, it becomes the property of the owner of the land, exactly as

10. *Ford v. Cobb*, 20 N. Y. 344; *R. Co.*, 39 Minn. 479; *Bank v. Stanton*, 55 Minn. 211; *Rowland v. Warren v. McGinnis*, 48 N. Y. 278; *Anderson*, 33 Kan. 264; *Walker v. Grand Rapids F. Mill Co.*, 70 Wis. 92; *Fischer v. Johnson*, 106 Iowa 181; *Wilgus v. Gettings*, 21 Iowa 177; *Wells v. Banister*, 4 Mass. 514; *Aldrich v. Parsons*, 6 N. H. 555.

That licensee has a reasonable time to remove fixture at expiration of license was held in *Ingalls v. R. R. Co.*, 39 Minn. 479; *Barnes v. Barnes*, 6 Vt. 388; *Northern, &c. R. Co. v. Canton Co.*, 30 Md. 347; and in *Russell v. Richards*, 11 Me. 371, leaving fixtures 3 years, there being no objection, did not result in loss of removal.

1. See cases cited in following notes.

2. *Mott v. Palmer*, 1 N. Y. 564; *Fenlason v. Rachliff*, 50 Me. 362; *Pullen v. Bell*, 40 Me. 314; *Priestly v. Johnson*, 67 Mo. 632; *Coleman v. Lewis*, 27 Pa. St. 291; *Ingalls v. R.*

in the case of annexation by a trespasser. Where, for instance, a contractor for the building or alteration of a house put in a furnace under a contract of conditional sale with the vendor thereof, the owner knowing nothing of such contract, he had no right to remove it himself, and therefore the vendor had no right to take it under his contract of conditional sale, since he had sold it to the contractor, and the owner had not consented to the contract.⁴ So when a vendee in possession under a contract of purchase annexes fixtures to the land, he has no right to take them away if the sale of the land falls through. He is treated as a licensee who has annexed fixtures without having either express or implied permission to remove them.⁵ However, if he annexes them under a contract of conditional sale, the vendee under such contract is entitled in such case to enforce the contract against the owner who has resumed possession to the extent of the balance due.⁶

§ 51. Questions Arising Between Vendor and Vendee, Mortgagor and Mortgagee, Heir and Personal Representative, Etc.—Though a good deal has been made of classifications of this description, it is submitted that such classification of fixtures is entirely unnecessary. Whether the question arises between vendor and vendee, mortgagor

4. *Jermyn v. Hunter*, 93 App. Div. (N. Y.) 175.

5. *McFadden v. Allen*, 134 N. Y. 489; *Andrews v. Powers*, 66 App. Div. (N. Y.) 216; *Chandler v. Hamil*, 57 App. Div. (N. Y.) 305; *Contra, Pullen v. Bell*, 40 Me. 314.

Since such purchaser in possession is a tenant at will, it is difficult to see why he is not permitted to remove such fixtures within a reasonable time, whether annexed under a

chattel mortgage or not, provided the vendor has let him take possession.

6. *Davis v. Bliss*, 187 N. Y. 77; *Palmatteer v. Robinson*, 60 N. J. L. 433; *Hendy v. Dinkerhoff*, 57 Cal. 3.

It is clear that these cases are inconsistent with the cases cited in the preceding note. The lien of the vendor of the fixture depends on the right of the vendee in possession. If the fixture has merged with the land, it is hard to see how the lien thereon could continue.

and mortgagee, heir and personal representative, the question is the same. Did the owner of the fee make the annexation in a way and under circumstances showing an intention to annex the thing permanently to the land?⁷ So where the question arises between the personal representative of a deceased life tenant and a remainderman, or between tenant for years and landlord, the question is, did the tenant for life or for years annex the thing with intent of permanently improving the property? In answering either question the nature of the interest of the person making the annexation must be considered. Therefore, the better classification, and the only one necessary in this connection is the one adopted, viz.: (a) fixtures annexed by the owner in fee and (b) fixtures annexed by tenants for life or for years.

§ 52. Annexation by Tenant for Life or for Years; Fixtures Removable and not Removable.—The one point of difference distinguishing cases under this topic from the cases considered heretofore is that in the case now to be discussed the fixture is annexed by one whose interest in the land is not absolute or unlimited, but is limited either to his life or to a term of years. We have no occasion to consider here mere chattels, furniture, utensils or tools,

7. N. Y. Code Civ. Pro. § 2712, Subd. 4, provides that "things annexed to the freehold, or to any building, for the purpose of trade or manufacture and not fixed into the wall of a house so as to be essential to its support" shall be assets and shall go to the personal representatives of the deceased to be distributed as part of his personal estate. Subd. 9 provides that "things annexed to the freehold, or to a building, shall not go to the executor" but shall descend to the heir, except such fixtures

as are mentioned in Subd. 4. This has been interpreted as meaning that those things annexed to the land or building so as to become part of it under common law principles are real property and go to the heir, while chattels not so annexed remain personalty and go to the personal representative. *House v. House*, 10 Paige (N. Y.) 158; *Murdock v. Gifford*, 18 N. Y. 28; *Ford v. Cobb*, 20 N. Y. 344. It is apparent, therefore, that this statute as construed has made no substantial change in the law.

which do not become fixtures in either case,¹ but only those annexations which would become part of the land if annexed by the owner in fee. As we have seen, such annexations may properly be, and are as a matter of fact, called fixtures, whether or not they become part of the land.² In determining whether or not they become real property we are guided by the same test employed in the case of annexation by the owner of the fee, viz.: the intent of the annexor as determined from the facts and circumstances under which the annexation is made; only we must take into consideration the new fact of the annexor's limited interest in the land in determining what the intent of the average man would be in his position. It would be contrary to human experience to hold that a tenant for a short term or a tenant for life, intended to permanently improve the property for the benefit of the landlord or remainderman. Therefore, in annexations of every description made by such tenants, whether of fixtures used for the purpose of trade, of agriculture or of domestic convenience, the rule is that they remain the personal property of the tenant and may be removed by him at or before the expiration of his term; they do not become part of the land because they were not attached with that intent.³ Where, however, their character and the character of their annexation is such that they lose their identity as distinct things, or cannot be removed without seriously damaging the freehold, or without rendering the fixtures themselves of little or no value, then they become per-

1. Articles which would be personal property though brought on the premises by the owner in fee, remain the property of the tenant before and after the expiration of the lease. They are not fixtures, and are not identified with the land for any purpose. See *Gutherie v. Jones*, 108 Mass. 191; *Kimball v. Grand Lodge, &c.*, 131 ss. 59; *Metropolitan Concert Co.*

v. Sperry, 9 N. Y. St. Rep. 342 (holding that chairs screwed to the floor in a theatre were not fixtures, but mere chattels).

2. See § 37, *ante*.

3. See especially cases in note 8 following and cases in note immediately following.

manently identified with the land as part of it. In such cases the only intent reasonably to be attributed to the tenant as a reasonable man is that he intended to annex such fixtures as permanent additions to the realty.⁴

§ 53. Removable Fixtures—Are they Real or Personal Property?—If we apply the same principles which have controlled the courts in like cases, the necessary conclusion is that removable fixtures annexed by a tenant for years or for life are the personal property of such tenant. All the cases admit that during the term such fixtures are the property of the tenant. He may remove, sell, destroy them, or do with them what he will during his term. Until left on the premises by the tenant after the expiration of his lease the landlord or remainderman has no interest in them whatever. In the case of a building or other fixture annexed by a licensee, the title thereto to remain in him, it remains personal property because of the separation of the ownership of the fixture from the ownership of the land.⁵ For the same reason, fixtures annexed under chattel mortgages or contracts of conditional sale remain personal property.⁶ So also in the case of trees transferred by deed or written contract for future removal, they become personalty, though not removed, because of the severance of title and ownership.⁷ Therefore, in the case of fixtures removable by a ten-

Ch. 474; *Callamore v. Gillis*, 149 Mass. 578; *Talbot v. Whipple*, 14 Allen (Mass.) 177; *Pond, &c. Co. v. O'Connor*, 70 Minn. 266; *O'Brien v. Kusterer*, 27 Mich. 289; *Carver v. Gough*, 153 Pa. St. 225; *Bernheimer v. Adams*, 70 App. Div. 114; *Ashby v. Ashby*, 59 N. J. Eq. 536; *Marks v. Ryan*, 63 Cal. 107; *State v. Elliott*, 11 N. H. 540.

Where the tenant's intention, deduced from all the facts, is to make

4. *Whitehead v. Bennett*, 27 L. J.

a permanent annexation, and the fact is shown by his agreement with his landlord, a building erected by him is not removable. *Fletcher v. Kelly*, 88 Iowa 475; *Tunis L. Co. v. Dennis L. Co.*, 97 Va. 682.

See also § 55 *post*, and cases thereunder in note 4 as to removability of structures of brick and stone.

5. See § 50, *ante*, and cases cited.

6. See § 46, *ante*, and cases cited.

7. See § 11, note 9, *ante*, and cases cited.

ant for years or for life, his separate, distinct ownership of them, apart from the title to the land, necessarily makes them personal property. The weight of authority is that such fixtures are personalty.⁸ It has been said, in a number of cases in several jurisdictions, that they are, for the time being, part of the realty, remaining permanently part of the land unless removed by the tenant; that they are therefore real property subject to the tenant's right of removal.⁹ From the standpoint of these cases the tenant's right of removal is regarded as a special right enjoyed by tenants, based on public policy rather than on any controlling principle of ownership. It is admitted, however, in these very cases, that such fixtures are the tenant's prop-

8. *Globe Marble Mills Co. v. Quinn*, 76 N. Y. 23; *Moore v. Wood*, 12 Abb. Pr. (N.Y.) 393; *Conde v. Lee*, 55 App. Div. (N. Y.) 114; *Heffner v. Lewis*, 73 Pa. St. 302; *Watts v. Lehman*, 107 Pa. St. 106; *Kile v. Giebner*, 114 Pa. St. 381; *Bartlett v. Haviland*, 92 Mich. 552; *Belvin v. Raleigh Paper Co.*, 123 N. Car. 138; *Beloit, &c., Bank v. Merrill Co.*, 69 Wis. 501; *Morey v. Hoyt*, 62 Conn. 553; *Gordon v. Miller*, 28 Ind. App. 612.

These cases hold that such fixtures remain the tenant's personal property because not annexed with the intention of making them a permanent part of the freehold for the benefit of the landlord, but for the temporary use and convenience of the tenant during the term. That the separation of the title to the fixtures from title to the land makes personalty is dealt with particularly in *Bartlett v. Haviland*, 92 Mich. 552, *supra*.

9. *Holland v. Hodgson*, L. R. 7 C P., 328, 336; *Freeman v. Dawson*, 110 U. S. 264, 270; *Stockwell v. Marks*, 17 Me. 455; *Brown v. Wallis*, 115

Mass. 156, and *Raddin v. Arnold*, 116 Mass. 270 (holding that trade fixtures, though removable, are real property, so that replevin in trover cannot be maintained against the landlord based upon his wrongfully preventing the tenant from removing them); *Preston v. Briggs*, 16 Vt. 124. (In this case the statements by the court are *dicta*, since the tenant had left the fixtures on the premises after the end of his term, and they had therefore become real property in any event); *Donnelly v. Thieben*, 9 Ill. App. 495 (statements to same effect *dicta* for a like reason, the tenant having left fixtures on the land after the end of his term); *Carlin v. Ritter*, 68 Md. 478 (this and preceding case place reason for the rule that tenant loses his right of removal on leaving the fixtures on premises at the end of his term, or on making a new lease, on fact that the fixtures are part of the land, subject merely to the right of removal during the term).

erty, and that would seem to be an all-sufficient reason for his right to remove them, entirely consistent with the rights of licensees and others owning fixtures annexed to land of which they are not owners. It cannot be claimed that the tenant's interest in the land should make any difference. His ownership of the fixture is as absolute as that of the licensee above referred to, and is entirely distinct from his ownership of the land, which is limited to his interest for a term of years or for life. Furthermore, there seems to be no good reason for holding that the modern test of intent should be abandoned in these cases. It is much better that the test should be uniform in all cases. In annexing removable fixtures, it is clear that a tenant does not intend to make them part of the land, applying the test of "reasonably presumed intent" to be gathered from all the circumstances, including the fact of the tenancy. It is hard to understand how such fixtures can be held to have become part of the land in the absence of such intent. On principle, therefore, there is nothing to be said in favor of the position that such fixtures are real property during the term.

§ 54. Trade Fixtures, Agricultural Fixtures, and Fixtures for Domestic Conveniences.—Originally annexations made by a tenant for years were treated as though made by the landlord, because the tenant was treated as the landlord's bailiff, having no interest in the land beyond the mere contractual right to occupy and work it.¹⁰ When the tenant's interest came to be recognized as an estate in the land, which the law would protect even against the landlord, the rule had already been established that tenants could not remove fixtures, annexed by them, without committing waste.¹ The first modification of this rule was in favor of trade fixtures, that annexations made for the pur-

10. Co. Litt. 53a. See § 22, *ante*. *Iakenden's Case*, 4 Co. 64; *Cook v. Year Book*, 17 E. 2, p. 518; *Her- Humphrey, Moore* 117.

pose of manufacture and trade by a tenant for his own advantage might be removed by the tenant during his term.² This was subsequently extended to include fixtures annexed to dwellings for domestic convenience and ornament.³ In England it has been held that agricultural fixtures are not removable, but this seems to have been limited to buildings of a permanent nature erected upon a farm.⁴

This development of the common law with reference to tenant's fixtures is in entire accord with the development of the rule governing fixtures generally. Until comparatively recent times the one test of a fixture was annexation, and we have seen how the modern law has grown away from this, or rather has evolved a test by which permanency of annexation may be determined, viz.: the test of intent as deduced from circumstances under which the annexation is made.⁵ It was natural that the court should treat the tenant's right to remove fixtures as in the nature of an exception to the general rule, which justice and public policy required. The modern rule is, however, that fixtures annexed by a tenant do not become part of the land unless tenants can be held, under all the circumstances of the case, to have intended to affix them permanently and not for the temporary use of the tenant during the term. In other words, we have here only an application of the general rule governing all cases of fixtures. This is now recognized as the reason why trade fixtures and fixtures of domestic convenience are removable by such tenants. Trade fixtures and fixtures of domestic convenience or ornament include, under the cases, all kinds of annexations made by tenants to lands or buildings, such as boilers, and engines, machinery

2. Year Book, 20 H. 7, 13a and b; Poole's Case, Salk. 368; Elwes v. Maw, 3 East 38.

3. Beck v. Rebow, 1 P. Wms. 94; *Ex parte* Quincey, 1 Atk. 477; Lawton v. Lawton, 3 Atk. 13; Elwes v. Maw,

3 East 38 (in which there is a review of the development of the law on this point).

4. Elwes v. Maw, 3 East 38.

5. See §§ 38, 42-44.

of all kinds of a permanent character and fixtures of every kind used in mills and factories;⁶ partitions, plate glass windows, counters, bars, plumbing fixtures of every kind used in stores or offices,⁷ mantels, wainscoting, plumbing fixtures and fixtures of all kinds used by tenants in connection with houses and dwellings.⁸ Whether agricultural or miscellaneous fixtures, not falling naturally within the above groups, are removable by such tenants or not must be determined by applying the same test of intent, and under the modern cases this is the rule.⁹ It would seem, therefore, that any reason for distinguishing between trade and domestic fixtures on the one hand, and agricultural and other fixtures on the other, no longer exists. Any fixture annexed by a tenant may be removed by him if it does not become part of the land, but remains his personal property, applying the test of intent in determining its character. As was stated in a preceding section (§ 52) such fixtures will be held to be the property of the tenant and removable by him when they may be removed without serious injury to the land and without destruction or disproportionate impairment in value of the fixtures.

6. *Globe Marble Mills Co. v. Quinn*, 76 N. Y. 23; *Conde v. Lee*, 55 App. Div. (N. Y.) 401; *Merritt v. Judd*, 14 Cal. 59; *Moon v. Smith*, 24 Ill. 512; *Baker v. McClurg*, 198 Ill. 28; *Dostal v. McCaddon*, 35 Iowa 318; *Holbrook v. Chamberlain*, 116 Mass. 155; *Conrad v. Saginaw Mining Co.*, 54 Mich. 249; *Bartlett v. Haviland*, 92 Mich. 552; *Gordon v. Miller*, 28 Ind. App. 612; *Thompson Scenic R. Co. v. Young*, 90 Md. 278; *Beloit, etc. Bank v. Merrill Co.*, 69 Wis. 501; *Heffner v. Lewis*, 73 Pa. St. 302; *Watts v. Lehman*, 107 Pa. St. 106; *Belvin v. Raleigh Paper Co.*, 123 N. Car. 138; *Ashby v. Ashby*, 59 N. J. Eq. 536; *Torrey v. Burnett*, 38 N. J. L. 457.

7. *Bernheimer v. Adams*, 70 App.

Div. 114; *Hayford v. Wentworth*, 97 Me. 347; *Guthrie v. Jones*, 108 Mass. 191; *Dostal v. McCaddon*, 35 Iowa 318; *Wall v. Hinds*, 70 Mass. 256; *Berger v. Hoerner*, 36 Ill. App. 360; *Fletcher v. McMillan*, 103 Mich. 494.

8. *Livingston v. Sulzer*, 19 Hun 375; *Cranston v. Beck*, 70 N. J. L. 145; *Guthrie v. Jones*, 108 Mass. 191; *Seeger v. Pettit*, 77 Pa. St. 437; *Raymond v. Strickland*, 124 Ga. 504.

9. *Carver v. Gough*, 153 Pa. St. 225; *Van Ness v. Pacard*, 27 U. S. 137; *Smyth v. Stoddard*, 203 Ill. 424; *Hedderick v. Smith*, 103 Ind. 203; *Wing v. Gray*, 36 Vt. 261; *Mott v. Palmer*, 1 N. Y. 564; *Whiting v. Brastow*, 4 Pick. (Mass.) 310; *McMath v. Levy*, 74 Miss. 450.

§ 55. **Buildings.**—Buildings erected in a permanent way are, of course, fixtures, becoming part of the land when annexed by the owner in fee, but remaining the property of the tenant and removable by him when annexed by a tenant for years provided they can be removed without serious injury of a permanent kind to the land, and without too great impairment in value of the building.¹⁰ Where land is leased for the purpose of business, either of trade or manufacture, and a building is erected in order that the business may be carried on, it is clear that the tenant erected the building, not as a permanent improvement of the land, but solely for the purpose of utilizing the land for the needs of his business. It therefore remains his property subject to removal, and this may be said to be true in nearly all cases.¹ But where a building of a permanent nature is erected for agricultural purposes, removable only by demolishing it, of little value except attached where it was built, and designed for the permanent improvement of the farm as such, the evident intention was to annex it as a permanent improvement of the farm, and the tenant cannot remove it.² The same rule applies to dwelling houses; if erected in a permanent way they are not subject to removal.³ In any case, if the building is of a temporary nature it is the tenant's personal property.⁴

10. *Van Ness v. Pacard*, 27 U. S. 137; *Dubois v. Kelly*, 10 Barb. (N. Y.) 496; *Talbot v. Cruger*, 151 N. Y. 117; *Cronie v. Hoover*, 40 Ind. 49; *Moore v. Wood*, 12 Abb. Pr. (N. Y.) 393; *Firth v. Rowe*, 53 N. J. Eq. 520; *Smyth v. Stoddard*, 203 Ill. 424; *Union Ter. Co. v. Wilmer*, 116 Iowa 392; *Hedderick v. Smith*, 103 Ind. 203; *Preston v. Briggs*, 16 Vt. 124; *Smith v. Whitney*, 147 Mass. 479; *Antoni v. Belknap*, 102 Mass. 193.

1. See cases in preceding note.

2. *Elwes v. Maw*, 3 East 38; *Carver v. Gough*, 153 Pa. St. 225; *Comp.*

Van Ness v. Pacard, 27 U. S. 137. See, also, *White v. Arndt*, 1 Whart. (Pa.) 91; *Haffick v. Stober*, 11 Ohio St. 482; *McCullough v. Irvine*, 13 Pa. St. 438.

3. *Doak v. Wiswell*, 38 Me. 569; *Cannon v. Hare*, 1 Tenn. Ch. 22.

4. *Smyth v. Stoddard*, 203 Ill. 424; *Loughran v. Ro's*, 45 N. Y. 792; *Lewis v. Ocean, etc. Co.*, 125 N. Y. 341; *Talbot v. Cruger*, 151 N. Y. 117; *Carlin v. Ritter*, 68 Md. 468.

Some question is made as to whether buildings of brick and stone can ever be removed, since it means

§ 56. When Tenant May Remove Fixture.—The law is well settled in all jurisdictions that a tenant for years must remove fixtures belonging to him during the term, or if he holds over, before quitting possession of the premises as tenant, and if left on the premises thereafter they merge with the land and become the property of the landlord.⁵ The reason usually given is that under such circumstances a gift to the landlord will be presumed, the fixture having been abandoned to the land. That a gift is not in fact intended by the tenant in any such case is clear enough. The fair inference is that the tenant intends no gift, as such intent would be contrary to human nature and common ex-

tearing down the building and converting it into a mass of mere loose building material. In *Whitehead v. Bennett*, 27 L. J. Ch. 474, it was held that a brick building could not be removed by a tenant as it would result in the practical destruction of the building. In *Collamon v. Gillis*, 149 Mass. 578, it was held that a baker's oven could not be removed, since it would result in destroying it or reducing it to a mass of crude materials. In many of the cases cited above, as *Moon v. Wood*, 12 Abb. Pr. 393 and *Van Ness v. Pacard*, 27 U. S. 137, it was held that buildings of brick and stone might be removed, and in *Baker v. McClurg*, 198 Ill. 28, ovens, engines and boilers used in a bakery business were held removable fixtures, even though it would involve taking them apart brick by brick and piece by piece, since they were of value to the tenant and the premises could be left substantially as before their annexation.

5. *Wheaton v. Woodcock*, 7 Mees & Wels. 14; *Ex parte Brook*, 10 Ch. Div. 100; *Ex parte Stephens*, 7 Ch. Div. 127; *Loughran v. Ross*, 45 N. Y. 792;

Torrey v. Burnett, 38 N. J. L. 457; *Merritt v. Judd*, 14 Cal. 59; *Security Loan Co. v. Willamette Co.*, 99 Cal. 636; *Dingley v. Buffum*, 57 Me. 381; *Schreiber v. Chicago, etc. R. Co.*, 115 Ill. 340; *Union Ter. Co. v. Wilmar R. Co.*, 116 Iowa 392; *Stokes v. Upton*, 40 Mich. 581; *Mueiler v. Chicago, etc. R. Co.*, 111 Wis. 300. See, also, cases cited under § 57, *post*.

Where the landlord consents to the tenant's leaving the fixture, with the understanding that the tenant may remove it thereafter, the fixture does not merge with the land as the landlord's property, but may be removed by the tenant in accordance with his agreement with, or license from, the landlord. In such case the tenant is in no sense a trespasser. *Torrey v. Burnett*, 38 N. J. L. 457; *Broadbudd v. Smith*, 121 Ala. 335; *Thorne v. Sutherland*, 123 N. Y. 236; *Conde v. Lee*, 55 App. Div. 401, *aff.* 171 N. Y. 662.

When the tenancy is terminated by forfeiture for breach of condition the same rule applies. *Morey v. Hoyt*, 62 Conn. 542; *Davis v. Moss*, 38 Pa. St. 346.

perience. That this is not the controlling reason will appear if we take the case of a tenant who states to his landlord that he intends no gift, but that he intends to return later and remove the fixtures. If the landlord does not consent to this, the tenant cannot return and take the fixture away, and yet there is no semblance of a gift in such case. The controlling reason for this rule, as suggested in a New Jersey case⁶ is that the tenant will not be permitted to reserve the right to remove such fixtures after the termination of his tenancy, since it would involve a "plain trespass to the property of another." Therefore such tenant should occupy the same position as a trespasser who has annexed fixtures to the land after the expiration of the term. Such a trespasser has no right to such fixtures, which become, as we have seen, the property of the owner of the land as completely as though he had annexed them himself.⁷ Mere chattels, such as tools, furniture, etc., left on the premises by the tenant, remain his property and he will have the right to recover them, because they do not merge with the land on the termination of his tenancy. This is also true of mere chattels left on premises by a trespasser. This reason covers every situation which may arise under the rule and explains it in a way which is understandable. The "implied gift" or "abandonment" theory is not only purely arbitrary but it is dangerous in that it has led to decisions in the case of renewal of leases which are contrary to justice and to fundamental principles of ownership.⁸

§ 57. Removal by Tenants for an Indefinite Term.—Tenants from year to year and at will, representatives of tenants for life and all tenants whose holdings are uncertain, have a reasonable time in which to remove such fixtures after the termination of their estate or interest. As they

6. *Torrey v. Burnett*, 38 N. J. L. 457.

7. See § 50, *ante*.

8. See § 58 and cases cited thereunder.

cannot know when their estate is to terminate they are given this much leeway when their interest is brought to an end. So also when any tenant holds over after his term or interest has come to an end, as he continues technically as tenant by sufferance, he may remove such fixtures any time before he finally quits possession.⁹

§ 58. Effect of New Lease Between Landlord and Tenant.

—The rule prevails in the majority of the states in which the question has arisen that when the tenant takes a new lease for a further term, without reserving therein the right to remove fixtures, he loses the right to remove them and they become part of the land included in the lease.¹⁰ In those states which hold that removable fixtures are real property this rule is reasonable, since the tenant has failed to take advantage of the special right of removal, which, under the theory of those cases, the law gives him.¹ But in the majority of states where such fixtures are, very correctly, treated as the personal property of the tenant, it is impossible to justify the rule by any process of reasoning.

9. *Loughran v. Ross*, 45 N. Y. 792; *Lewis v. Ocean, etc. Co.*, 125 N. Y. 341; *Torrey v. Burnett*, 38 N. J. L. 457; *Watriss v. Nat. Bank of Cambridge*, 124 Mass. 571; *Sheller v. Shivers*, 171 Pa. St. 569; *Cronie v. Hoover*, 40 Ind. 49. In the case of a tenant holding over and becoming tenant by sufferance, he may still remove his fixtures as long as he has a right to regard himself as tenant. *Ex parte Brook*, 10 Ch. Div. 100; *Ex parte Stephens*, 7 Ch. Div. 127; *Merritt v. Judd*, 14 Cal. 59; *Schreiber v. Chicago, etc. R. Co.*, 115 Ill. 340; *Antoni v. Belknap*, 102 Mass. 193.

Where a tenant at will receives proper notice to quit he must move away his fixtures on or before the day

fixed for the termination of his tenancy. He is not given a reasonable time thereafter to remove them. *Erickson v. Jones*, 37 Minn. 459.

10. *Loughran v. Ross*, 45 N. Y. 792; *Stephens v. Ely*, 162 N. Y. 79; *Nieland v. Mahnken*, 89 App. Div. (N. Y.) 463; *Van Vleck v. White*, 66 App. Div. (N. Y.) 14; *Gerbert v. Trustees, etc.*, 59 N. J. L. 160; *Watriss v. Nat. Bank of Cambridge*, 124 Mass. 571; *Carlin v. Ritter*, 68 Md. 468; *Chicago Sanit. Dist. v. Cook*, 169 Ill. 184; *Hedderick v. Smith*, 103 Ind. 203; *Marks v. Ryan*, 63 Cal. 107; *Wadman v. Burke*, 147 Cal. 351; *St. Louis v. Nelson*, 108 Mo. App. 210.

1. See treatment of this subject in *Carlin v. Ritter*, 68 Md. 468.

These cases generally state the reason to be that there is at least a momentary surrender of the premises to the landlord, and the taking back of them under the new lease; that during the moment of such surrender the fixtures merge with the land on the "implied gift" or "abandonment" theory, and therefore the tenant loses them. The danger of this utterly false and unsupportable theory of "implied gift" or "abandonment" lies in the effect it has had in leading the courts to take this position. Thus, without any actual intention on the part of either party to transfer the fixture, without any bill of sale or other transfer, without any wrongful act on the part of the tenant in making use of the property of another for the purpose of his fixtures, the tenant finds himself divested of title to the fixtures, worth perhaps thousands of dollars, which just before the lease was signed were indisputably his property, but which, through some judicial magic, become the property of his landlord a moment later when the new lease is signed and delivered. The argument sometimes advanced that the new lease covers the land including the fixtures begs the whole question.² It does not cover the property of the tenant unless he intended that it should, and any such intent cannot be taken for granted any more than the intent to make a gift.

The absurdity of this position clearly appears when the tenant takes the new lease some time before the expiration of the old lease. In that case there is no momentary surrender—the tenant has an interest or estate in the property continuing without break until the expiration of the term given by the new lease.³

The best considered cases hold that the new lease has no

2. In *Loughran v. Ross*, 45 N. Y. 792, this position was taken, and the argument is repeated and relied on in several cases in other jurisdictions, above cited which followed the *Ross* case.

3. Such was the situation in *Loughran v. Ross* and *Watriss v. Cambridge*, etc. Bank, and some of the other cases above cited.

effect on the tenant's right to remove fixtures; that as long as he continues to occupy the premises rightfully as tenant he has a right to take away such fixtures, whether he holds under one lease, or under a succession of leases made at intervals.⁴ We have seen that even in the case of a tenant holding over wrongfully after his term has ended as a tenant by sufferance, he has the right to remove fixtures prior to his quitting possession. It is absurd to hold that the same tenant should be deprived of his fixtures if, instead of holding over as a wrongdoer, he had made a new lease and paid the rent thereunder which the landlord required.

§ 59. Fixtures Annexed by Tenants for Life.— In the preceding sections fixtures annexed by tenants for life have been considered with fixtures annexed by tenants for years,

4. *Kerr v. Kingsbury*, 39 Mich. 150; *Radey v. McCurdy*, 209 Pa. St. 306; *Sec. Nat. Bank v. Merrill Co.*, 69 Wis. 501; *Berg. v. Herring-Hall Marvin Safe Co.*, 136 Fed. 368; *Thomas v. Gayle*, 134 Ky. 330. *Wright v. McDowell*, 88 Tex. 140, and *McCarthy v. Trumecher*, 108 Iowa 284, while admitting the prevailing view to be that a new lease terminates the tenant's right to remove fixtures, take the position that the very question to be decided is whether the tenant actually intends any such gift to the landlord, and in each of these cases it was naturally found that as a matter of fact the tenant had no such intent; therefore the fixtures involved did not merge with the land.

In *Bernheimer v. Adams*, 70 App. Div. (N. Y.) 114, the court held that the general rule should be limited to buildings and other erections not removable without serious injury or damage to the buildings or land, which are inherently part of the land;

that it should not apply to trade fixtures. The court held that urinals, water closets, a partition, etc., placed in a business building by a tenant, were removable by him even after the execution of a new lease in which the right of removal was not reserved. This case was affirmed without opinion, 175 N. Y. 472. Whether this modification of the rule laid down in *Loughran v. Ross*, was concurred in by the Court of Appeals is therefore left in doubt, as there seems to be other ground on which their affirmation may have been based.

In *Berge v. Herring, etc. Safe Co.*, 136 Fed. 368, the Circuit Court of Appeals followed the *Bernheimer* case, the court stating that there are no principles of law or equity on which the prevailing rule (as to effect of new lease in taking away the right to fixtures) can be based. In the last two cases the principles involved are very clearly discussed.

since they are governed by the same principles and rules of law. It has been suggested by way of dicta in a few cases that the rule as to the removal of fixtures is stricter as against tenants for life, but this is true only so far as the difference in the character of the life tenant's interest may be held to modify his intent.⁵ In general, fixtures annexed by life tenants are governed by the same principles and subject to the same rules as fixtures annexed by tenants for years.⁶

F.—Waste.

§ 60. **Waste Defined.**— We have seen that absolute ownership gives absolute control and dominion over property, including the right to destroy or to permanently damage it, subject only to the limitation imposed by law on all, that the owner shall not maintain a nuisance on his land. In cases of tenants for life, tenants for years, and tenants from year to year, whose ownership is limited rather than absolute, a further limitation is imposed, viz., that they shall not commit waste. Waste is injury to the land done or suffered by a tenant for life, for years or from year to year, which results in damage of a permanent kind, so that the premises are permanently reduced in value. The damage is to the interest of the one who is to succeed to the possession and enjoyment of the property after the termination of the precedent estate for life or for years. Damage to the future estate of the reversioner or remainderman is the essential requisite of waste.¹ Waste can be committed only by tenants entitled to the possession. Such tenants cannot be guilty of trespass, since trespass is an injury to the possession, and can be committed against those only who have

5. *White v. Arndt*, 1 Whart. (Pa.) 91; *Haffick v. Stober*, 11 Ohio St. 482; *McCullough v. Irvine*, 13 Pa. St. 438; *Doak v. Wiswell*, 38 Me. 569; *Gliddon v. Bennett*, 43 N. H. 308.

6. *Lawton v. Lawton*, 3 Atk. 13; *Elwes v. Maw*, 3 East 13; *Buckley v. Buckley*, 11 Barb. (N. Y.) 43, 61; *Whiting v. Brastow*, 4 Pick. (Mass.) 310; *Overman v. Sasser*, 107 N. C. 432, and cases in preceding note.

1. 2 Bl. Com. 281. See cases cited under sections following.

the possession. Tenants impeachable for waste were liable at common law not only for their own acts of waste, but also for the acts of any stranger resulting in permanent injury, excluding damage done by the public enemy or resulting from storm or tempest, or fire arising without wilful wrong or negligence.² The tendency of the modern cases is against this position, which was never supported by any controlling reason. Waste is voluntary when resulting from acts of commission, it is permissive when resulting from a failure on the part of the tenant to make repairs and to maintain the property in a reasonable manner as required by law.³

§ 61. Who May Be Held for Waste.—Under the ancient common law guardians in chivalry and tenants in dower and curtesy were alone punishable for waste. The law gave this remedy against such tenants because their estates were

2. Anonymous, Fitz Ab. Waste Pl. 30; Co. Litt. 54a; Fay v. Brewer, 3 Pick. (Mass.) 203; Regan v. Luthy, 34 N. Y. St. Repr. 10; Dix v. Jaquay, 94 App. Div. (N. Y.) 555, and cases cited; Cargill v. Sewell, 19 Me. 288, 291; Wood v. Griffin, 46 N. H. 230; Randall v. Cleveland, 6 Conn. 328; Consolidated Coal Co. v. Savitz, 57 Ill. App. 659.

That the tenant is not liable in waste except for his own acts or negligent conduct, see Winfree v. Jones, 104 Va. 39, and Rogers v. Atlantic Gulf and Pac. Co., 213 N. Y. 246. In the case last cited the Court of Appeals makes clear that if any reason ever existed for the old rule it no longer has any application, as the stranger may be sued directly by the reversioner or remainderman. The court expressly disapproves of the position taken by an inferior court in Regan v. Luthy, *supra*. Though the

point was not so directly involved as to make this case a controlling decision thereon, nevertheless the strength of the court's position and the unimpeachable character of the reasoning followed will probably result in the final overthrow of the old rule, which never had a valid reason to support it. The landlord may sue the stranger directly either in an action on the case or under statutes providing therefor, such as N. Y. Code, § 1665, and the old excuse that the tenant should be held liable as the landlord could not sue the stranger, has no application to-day, and has had none since the development of the action on the case.

3. 2 Bl. Com. 281; Syndham v. Jackson, 54 N.Y. 450; Moore v. Townshend, 33 N. J. L. 284; Ferguson v. —, 2 Esp. 590; *In re Cartwright*, 41 Ch. Div. 532.

created by the law and not by any transfer or other act of any person. In cases of tenants for years or for life created by grant or devise, the owner might provide against the doing of waste in the deed or will by which the estate was created, and if he failed to do so the law gave him no remedy. But by the Statute of Malbridge⁴ and of Gloucester⁵ it was provided that the writ of waste might be maintained against tenants for years and life of every kind. Waste, therefore, from the standpoint of a court of law, can be committed only by tenants for life and for years, including tenants from year to year.⁶ It has always been held that tenants at will do not come within the provisions of these statutes, and therefor such tenants are not liable for waste, as such. Acts which would amount to voluntary waste in the case of tenants for life or for years are acts

4. 52 Henry III, c. 23.

5. 6 Edw. I, c. 5. This statute provided, further, that the tenant adjudged guilty of waste should forfeit the place where the waste was committed and also treble damages. Forfeiture and the provision for treble damages were done away with in England by statute 344, Wm. IV, c. 27.

In the absence of special statutory provision the action of case in the nature of waste has taken the place of the common law writ, and single damages only are recoverable. *Herne v. Bernbow*, 4 Tauton. 764; *Moore v. Townshend*, 33 N. J. L. 284; *Johnson v. Johnson*, 18 N. H. 594. In most states there are special statutes providing remedies for waste, some of which provide for double or treble damages, and sometimes forfeiture of the place wasted. See 1 Stimson Am. St. Law. §§ 1332. 1343.

In New York the action for waste is provided for by §§ 1651-1659 of the Code of Civil Procedure. By § 1651

a tenant for life or for years or the assignee of such a tenant is liable for waste committed "without a special and lawful written license so to do,"

§ 1652 provides that an heir or devisee may sue for waste committed in the time of his ancestor or testator as well as in his own time. The grantor of a reversion may maintain an action for waste committed before the grant. § 1653 provides for an action for waste committed by a guardian upon the real property of the ward. § 1655 provides that if the plaintiff recovers he is entitled to treble damages, and where the plaintiff is the person next entitled to the reversion, and it appears that the damage done the reversion is equal to the value of the tenant's estate or unexpired term or that it was done maliciously, the final judgment must also award forfeiture of defendant's estate, and possession of the place wasted.

6. *Moore v. Townshend*, 33 N. J. L. 284; *Lothrop v. Thayer*, 138 Mass. 466.

of trespass when committed by a tenant at will, which may be treated by the landlord as terminating the estate of the tenant, who may be held for damages in an action of trespass.⁷

Some doubt has arisen as to whether tenants for life or for years can be held for permissive waste. This turns on whether the statutes of Malbridge and Gloucester should be construed as including waste resulting from failure to repair, as a result of which the freehold is permanently damaged. The earlier English cases and authorities hold that the statutes apply to everything treated as waste before the statutes were enacted, both voluntary and permissive, the purpose of the statutes being to extend the remedy to cover waste of every kind committed by all classes of tenants for life and for years, as well as tenants in dower and curtesy, and guardians in chivalry, leaving the question of what is and what is not waste to be determined by the principles of the common law.⁸ There can be no doubt that before these statutes waste included injuries resulting from failure to make reasonable repairs as well as from voluntary acts of destruction. In the United States this view is taken, and tenants for life and for years are held liable for permissive waste.⁹ In England it is settled that a life tenant or his estate on his death cannot be held for waste of this kind,¹⁰ while the question of the liability of

7. Co. Litt. 57a; 5 Co. 13a; Cro. Eliz. 777, 784; Phillips v. Covert, 7 Johns. 1; Chalmers v. Smith, 152 Mass. 561, and cases in preceding note.

8. On this question Lord Coke said, referring to the statute: "To do or make waste, in legal understanding in this place, includes as well permissive waste, which is waste by reason of omission or not doing, as for want of reparation, as waste by reason of commission," etc. 2 Inst. 145; 7 Bac. Abr. 250; 2 Bl. Com. 283; Grif-

fith's Case, Moore 69, and other cases cited in opinion of Depue, J., in Moore v. Townshend, 33 N. J. L. 284.

9. Moore v. Townshend, 33 N. J. L. 284; Lothrop v. Thayer, 138 Mass. 466; Suyndham v. Jackson, 54 N. Y. 450; Newbold v. Brown, 44 N. J. L. 266 (holding that a tenant from year to year was liable for permissive waste); Wilson v. Edmonds, 24 N. H. 517; Harvey v. Harvey, 41 Vt. 377.

10. *In re Cartwright*, 41 Ch. Div. 532.

a tenant for years seems to be left in uncertainty under the later cases.¹

§ 62. Trees and Timber.—A tenant for years or for life may cut trees for the purpose of firewood to be used by himself on the premises,² and, where the amount required is not unreasonable, with reference to the amount of wood growing on the land, he may cut firewood for the use of a tenant occupying a tenant house and working the farm;³ though this will be waste if, under all the circumstances, it would be unreasonable.⁴ He must use dead and down timber if available rather than growing trees for this purpose,⁵ and he will not be permitted to cut timber trees, of special value for building purposes, if there are trees enough of the ordinary kind for fuel.⁶ Timber trees are those of special commercial value for lumber and for building pur-

1. *Ferguson v. —*, 2 Espinasse Fitz. Ab. Wast. Pl. 30; *Simmonds v. Norton*, 7 Bing. 640; *McGregor v. Brown*, 10 N. Y. 114; *Calvert v. Rice*, 91 Ky. 533; *Smith v. Smith*, 105 Ga. 106; *Walters v. Hutchins' Admx.*, 29 Ind. 136; *Clemence v. Steere*, 1 R. I. 272; *Padelford v. Padelford*, 7 Pick. 152; *Noyes v. Stone*, 163 Mass. 490; *White v. Cutler*, 17 Pick. (Mass.) 248; *Johnson v. Johnson*, 18 N. H. 594.

2. *Gardner v. Derring*, 1 Paige (N. Y.) 572; *Smith v. Jewett*, 40 N. H. 530.

3. *Salles v. Salles*, 3 Sandf. Ch. (N. Y.) 601, at 605.

4. *Simmons v. Norton*, 7 Bing. 640; *Jackson v. Brownson*, 7 Johns. (N. Y.) 227.

5. *Hogan v. Hogan*, 102 Mich. 641; *Calvert v. Rice*, 91 Ky. 533. See *Padelford v. Padelford*, 7 Pick. (Mass.) 152, and *Webster v. Webster*, 33 N. H. 18 holding that oak trees may be cut for fuel.

6. 2 Bl. Comm. 281; Anonymous,

As the question of waste between tenants in common or joint tenants is inseparably involved with the question of accounting for rents, etc., received, etc., under the statute of Anne, a consideration of it is deferred, and will be found in Ch. XI. § 218, under "Incidents of Co-Ownership."

2. 2 Bl. Comm. 281; Anonymous,

poses generally. This question is determined in accordance with the customs of the place where the question arises; those trees which have special value as timber in one place and at one time, may not be used for building purposes and may therefore have no special value as timber at another place at a different time.⁷ In England it is settled that oak, ash and elm trees are timber as a matter of law;⁸ while in some cases in this country, it appearing that oak trees were used generally for firewood, it was held that it was not waste to cut them for that purpose.⁹

Tenants for life and for years may cut timber trees to erect and repair necessary buildings and fences on the property.¹⁰ It is waste, however, to cut trees of any kind for the purpose of sale, even though the proceeds are used in making repairs or improvements, or in purchasing fuel to be used by the tenant on the premises.¹¹ It is also waste for a tenant to cut timber to replace or repair buildings for the destruction or injury of which he is liable in waste. But in the United States, in the case of wild and uncultivated lands, the strict rule of the common law has been modified so as to permit such tenants to cut and sell trees of any kind when it is done for the purpose of clearing the land and bringing it under cultivation. In such cases the cutting and removal of the trees must be in accordance with good husbandry, that is, enough trees and timber must be left to supply the future needs of the farm, and it must not

7. *Jackson v. Brownson*, 7 Johns. (N. Y.) 227; *Kidd v. Dennison*, 6 Barb. 9; *Hogan v. Hogan*, 102 Mich. 641; *Lester v. Young*, 14 R. I. 579.

8. *Honywood v. Honywood*, L. R. 18 Eq. 306.

9. *Padelford v. Padelford*, 7 Pick. (Mass.) 152; *Webster v. Webster*, 33 N. H. 18.

10. *Co. Litt.* 54b; *Morehouse v. Cotheal*, 22 N. J. L. 521; *Armstrong*

v. Wilson, 60 Ill. 226, and cases cited in note 2 preceding.

11. *McGregor v. Brown*, 10 N. Y. 114; *Babb v. Perley*, 1 Me. 6; *Modlin v. Kennedy*, 53 Ind. 267; *Webster v. Peet*, 97 Mich. 326; *Miller v. Shields*, 55 Ind. 71; *Noyes v. Stone*, 163 Mass. 490; *Phillips v. Allen*, 89 Mass. 115; *Johnson v. Johnson* 18 N. H. 594, and cases cited in preceding notes and notes immediately following.

result in permanent injury to the farm.¹² This rule has no application to settled communities and farms which have been already cleared for cultivation. In such cases the cutting of any trees for sale is waste.¹³

Still another exception is made, both in the United States and England, in the case of lands given over to the growth of timber or trees for sale. Tenants for life may cut and sell trees in such case, since it is in accordance with the customary and regular use and enjoyment of the land.¹⁴

§ 63. Mines, Quarries, etc.—Tenants impeachable for waste may work mines and quarries which are opened when

12. *Jackson v. Brownson*, 7 Johns. (N. Y.) 227; *Morehouse v. Cotheal*, 22 N. J. L. 521; *Keeler v. Eastman*, 11 Vt. 293; *Dawson v. Coffman*, 28 Ind. 220; *Warren Co. v. Gans*, 80 Miss. 76; *Proffitt v. Henderson*, 29 Mo. 325; *King v. Miller*, 99 N. C. 583; *McCullough v. Irvine*, 13 Pa. St. 438; *Sayers v. Hoskinson*, 110 Pa. St. 473; *Wilkinson v. Wilkinson*, 59 Wis. 557; *Drown v. Smith*, 52 Me. 141.

The cutting and removing of dead and down timber is not waste, as it improves the inheritance. *Bateman v. Hotchkin*, 31 Beav. 486; *Sayers v. Hoskinson*, 110 Pa. St. 473; *Keeler v. Eastman*, 11 Vt. 293; *Houghton v. Cooper*, 6 B. Mon. (Ky.) 281; *King v. Millar*, 99 N. C. 583.

So, also, tenants subject to waste are entitled to all proper thinnings and cuttings, bushes, &c., removed in the process of improving the land; 2 Bl. Com. 281-282; *Haywood v. Haywood*, L. R., 18 Eq. 306; *Phillips v. Smith*, 14 M. & W. 586.

Some of the cases seem to be authority for a more liberal modification of the common law rule, viz.: that timber land may be cleared and the timber sold in any case where

such cutting is in accordance with good husbandry and for the purpose of clearing the land for cultivation, where the value of the land is thereby increased. *Dawson v. Coffman*, 28 Ind. 220; *Warren Co. v. Gans*, 80 Miss. 76; *Wilkinson v. Wilkinson*, 59 Wis. 557. In these cases, however, it did not appear that the farms were fully cleared and the relative amounts of woodland and land for cultivation determined by the owner of the fee. The general rule, as expressed in *MacGregor v. Brown*, 10 N. Y. 114, is that the exception above referred to does not apply to settled communities and farms long cleared and settled. See text and note immediately following.

13. *MacGregor v. Brown*, 10 N. Y. 114; *Chase v. Hazleton*, 7 N. H. 171; *Clark v. Holden*, 7 Gray 8; *Keeler v. Eastman*, 11 Vt. 293.

14. *Honywood v. Honywood*, L. R., 18 Eq. 306; *Dashwood v. Magniac*, 3 Ch. 306; *Willard v. Willard*, 56 Pa. St. 119; *Neel v. Neel*, 19 Pa. St. 323; *Den. v. Kinney*, 5 N. J. L. 648; *Clemence v. Steere*, 1 R. I. 272; *Balentine v. Poyner*, 2 Hayw (N. C.) 110.

their tenancy begins, because the land is in this way appropriated to mining operations or quarrying, and the working of them is in accordance with the regular use and enjoyment of the property.¹ Such tenants may also sink new shafts to follow up the vein which has been opened.² It is waste to open a new mine, which includes the tapping of a new vein even though another vein has been opened on the same premises.³ Any opening of the land and the taking out of minerals for sale, even though the opening or excavation be slight, will be sufficient to permit the working of the mine by a tenant.⁴ If before the tenancy arose the mine was abandoned and closed by the owner of the inheritance, the mine is no longer "open" and the tenant will have no right to work it, but there must be affirmative evidence of the abandonment and closing to justify this result; mere non-user, even for many years, will not be enough.⁵

1. Co. Litt. 54 B; 2 Bl. Com. 283; *Coates v. Cheever*, 1 Cowen (N. Y.) 460; *Gaines v. Green Pond Iron Min. Co.*, 33 N. J. Eq. 603; *Sayers v. Hoskinson*, 110 Pa. St. 473; *Neel v. Neel*, 19 Pa. St. 324; *Billings v. Taylor*, 27 Mass. 460; *Ward v. Carp, & Co.*, 47 Mich. 65; *Findlay v. Smith*, 6 Munf. (Va.) 134; *Koen v. Bartlett*, 41 W. Va. 559 (oil and gas wells); *McCord v. Oakland, & Co.*, 64 Cal. 134; *Moore v. Rolins*, 45 Me. 493.

Such mines may be worked to exhaustion if worked by the tenant in the usual way. See cases above cited, particularly *Neel v. Neel* and *Sayer v. Hoskinson*; also *Irwin v. Covode*, 24 Pa. St. 162; *Westmoreland Coal Co.'s Appeal*, 85 Pa. St. 344; *Stoughton v. Leigh*, 1 Taut. 410.

In *Marshall v. Mellon*, 179 Pa. St. 371, it was held that the same principles applied to the opening of oil or gas wells, it being waste for a tenant

for life or for years to open such a well, none having been opened on the property.

2. *Clavering v. Clavering*, 2 P. Wms. 388; *Westmoreland Coal Co.'s Appeal*, 85 Pa. St. 344, and cases cited in preceding note.

3. The reason, of course, is that it will permanently depreciate the property in value, since it is a taking away of a valuable part of the land. See cases cited in last two notes.

4. *Gaines v. Green Pond Iron Min. Co.*, 33 N. J. Eq. 603; *Billings v. Taylor*, 27 Mass. 460 (quarry opened by husband at one point, extended to that entire deposit of stone within the limits of the tract, and the widow was held entitled to dower therein); *Moore v. Rollins*, 45 Me. 493 (semble).

5. *Gaines v. Green Pond M. Co.*, 33 N. J. Eq. 603.

Where, however, the owner in fee,

There is some authority in the United States for the proposition that in the case of wild and uncultivated lands, of value only for mining purposes, tenants for life or for years should be permitted to open up and work mines even though none have ever been opened on the premises, and this proposition is supported by sound reason and common sense. Any rule which prevents the only possible profitable use and enjoyment of the premises by a tenant for a limited term is unreasonable and contrary to fundamental principles of ownership. As in the case of land given over to the growth of timber or trees for profit, such tenants should be permitted to make use of the premises in accordance with the use to which the land has been appropriated, either by the act of man or by natural conditions.⁶

§ 64. Cultivation and Use of the Land.—A tenant impeachable for waste holding lands for farming purposes is bound to work the land in a husbandlike manner, that is, in accordance with accepted and customary methods of farming in vogue in the community where the land is situated. He must not work the land to exhaustion, either by ploughing and planting it too frequently, or by taking repeated crops without fertilizing the land in cases where the land requires fertilizer, or by any other method of cultiva-

before the tenancy for life or for years arose, took stone from a quarry merely for use upon the land, but not for the purpose of sale, the tenant thereafter may take stone only for a similar use, and not for commercial purposes. *Cotton L. J. in Elias v. Griffith*, 8 Ch. Div. 532. So, also, in case the owner took coals from an outcropping on his land for the sole purpose of use as fuel on the premises, none being sold, the tenant impeachable for waste was restricted to a like use of the coal. He could not work the coal mine for commercial

purposes. *Franklin Coal Co. v. McMillan*, 49 Md. 549. See dicta which is *contra* in *Neal v. Neal*, 19 Pa. St. 323, the court saying: "It is sufficient if he opened them, and derived any profit from them, even if it were only *fire bote*. The fact of his opening the pits made the coal a part of the profits of the land, and the right to them will pass as such by a devise of a life estate."

6. In *Re Seager Estate*, 92 Mich. 186; *Gaines v. Green Pond I. M. Co.*, 33 N. J. Eq. 603.

tion which in his community would be fairly regarded as bad farming.⁷ He must not sell or remove from the land manure made by the feeding of hay and other products of the land to live stock kept thereon, since good husbandry requires that such manure shall be used to maintain the fertility of the soil.⁸ For similar reasons hay, straw and like products must be fed out on the farm if that is the accepted and usual course of husbandry in the community,⁹ but it is generally recognized that part of the hay may be sold, since the usual course of farmers is to sell so much as they may not require for their stock. It is not waste, therefore, to sell hay, straw or like products, provided such sale is in accordance with good husbandry as practiced by the farmers in the neighborhood, and does not result in injury to the farm.¹⁰

The rule at common law was that the changing of arable land into woodland, or of meadow into plough land or pasture, or any other like changes, by a tenant for life or years, was waste even though there was no damage to the inheritance. The reason was that such changes tended to injure the reversion or remainder by impairing the evidences of title, rendering uncertain the descriptions of the property contained in deeds and wills.¹ Under the modern system of conveyancing by metes and bounds, everything constituting part of the land within the described boundaries passing to the grantee, this reason no longer applies, and therefore the modern rule is that changes of this description, if made in the due course of good husbandry, and without actual injury to the inheritance, are not waste. For instance it

7. *Clemence v. Steere*, 1 R. I. 272; 118; *Daniels v. Pond*, 21 Pick. 367; *Sarles v. Sarles*, 3 Sandf. Ch. (N. Y.) 601; *Chapel v. Hull*, 60 Mich. 167; *Lewis v. Jones*, 17 Pa. St. 262. 9. *Sarles v. Sarles*, 3 Sandf. Ch. (N. Y.) 601; *Wing v. Gray*, 36 Vt. 261. *Hubble v. Cole*, 85 Va. 87; *Walker v. Tucker*, 70 Ill. 527.

8. *Middlebrook v. Corwin*, 15 Wend. (N. Y.) 169; *Perry v. Carr*, 44 N. H.

10. *Wing v. Gray*, 36 Vt. 261.

1. *Coke Litt.* 53b; 2 Bl. Com. 282; *Comyn's Dig.* "Waste" D 4.

is not waste to grade land, lay out streets and erect dwelling houses which resulted in increasing the value of the inheritance, even though the buildings should be removed by the tenant. Nor is it waste to change pasture into meadow, or meadow into pasture, where the result is benefit rather than injury to the property.²

§ 65. Buildings; Changes and Improvements.—The destruction or removal of permanent buildings, or of any permanent part thereof by a tenant for life or years is waste, since the result is permanent impairment in value of the property,³ and under the general rule already discussed similar destruction or removal by a stranger was waste at common law for which the tenant was answerable, though he had nothing to do with the wrongful act.⁴ It is submitted that this rule is now obsolete, and no longer binds the courts.

The common law rule is still of general application, that a tenant impeachable for waste cannot alter the property by tearing down buildings and erecting others, or by making material alterations of a permanent nature, unless the right is given expressly or impliedly by the terms of the lease or other instrument of title under which he holds, or unless the owner of the inheritance consents.⁵ This is true irrespective of whether the changes will result in permanent injury or permanent betterment of the property, because

2. *Doherty v. Allman*, 3 App. Cas. 726; *Pyncheon v. Stearns*, 11 Met. (Mass.) 304; *Clark v. Holden*, 7 Gray 8; *Clemence v. Stêere*, 1 R. I. 272 (meadow changed to pasture); *Proffitt v. Henderson*, 29 Mo. 325.

3. *U. S. v. Bostwick*, 94 U. S. 53; *Robinson v. Wheeler*, 25 N. Y. 252; *Chalmers v. Smith*, 152 Mass. 561; *McCullough v. Irome's Exrs.*, 13 Pa. St. 438.

4. See § 60, note 2 thereunder.

5. *Co. Litt.* 53a; 3 Dana Abr. 215; *Com. Dig. Waste D 3*; *Smyth v. Carter*, 18 Beav. 78; *Doherty v. Allman*, 3 App. Cas. 709; *Agate v. Lowenbein*, 57 N. Y. 604; *Klie v. Van Broeck*, 56 N. J. Eq. 180; *Brock v. Dole*, 66 Wis. 142; *Melms v. Pabst Brew. Co.*, 104 Wis. 142; *Thacher v. Phinney*, 7 Allen (Mass.) 146; *Davenport v. Magoon*, 13 Ore. 3; *Williams v. Chicago Exhib. Co.*, 188 Ill. 19.

the landlord or reversioner has a right to have the property returned to him substantially unchanged in character beyond what is provided for under the lease, and what is reasonably incident to the estate of the tenant. Equity, therefore, will enjoin changes, even though they be improvements which are to be made contrary to the will of the owner of the inheritance, and which are not authorized, expressly or impliedly, by the terms of the lease or grant.⁶ The tenant, however, has a right to make alterations which will not cause permanent injury where the lease authorizes such alterations,⁷ and he may make changes which are not of a permanent character as he pleases, since the inheritance is not affected. He may tear down a building which is ruinous and erect another of the same general character, since that is not only a benefit rather than an injury, but it is an act reasonably incident to his holding, and therefore may be regarded as impliedly authorized by the lease.⁸ Tenants for long terms and for life may make more extensive changes than tenants for a short term, since such changes would be incident to their interests as tenants, and therefore impliedly authorized, which would not be the case with

6. See cases in preceding note, especially *Smyth v. Carter*, 18 Beav. 76; *Klie v. Van Broock*, 56 N. J. Eq. 180 (containing review of the cases and admirable treatment of this question); *Brock v. Dole*, 66 Wis. 142; *Melms v. Pabst Brew. Co.*, 104 Wis. 7.

7. When the lease permits alterations "provided they do not injure the premises," as in *Agate v. Lowenheim*, 57 N. Y. 604; or where the permission is accompanied with a covenant not to commit waste, as in *Hasty v. Wheeler*, 12 Me. 434; or where the estate of the tenant is without impeachment of waste "save and except spoil and destruction, voluntary and permissive waste" as in *Vincent v.*

Spicer, 22 Beav. 380, the courts hold that the tenant may make alterations even though they amount to waste, provided no permanent injury is done the inheritance and the alterations are such as a prudent owner would make in the due course of management.

8. *Beers v. St. John*, 16 Conn. 322; *Jackson v. Andrews*, 18 Johns. 431. It is not waste to erect a new building. See in addition to above cases, *Klie v. Van Broock*, 56 N. J. Eq. 180, in which case *Pitney, V. C.*, points out that the statement by *Littleton* that the erecting of a new building was waste was soon after abandoned, and was never law.

tenants for short terms.⁹ Where the property in the neighborhood changes in character, as where a dwelling becomes of no value for rental purposes as such on account of mills and factories which have grown up all around it, it is not waste for a tenant for life or for a long term to destroy the dwelling in order to improve the land and make it more valuable for commercial purposes. The right to make changes of this character under such circumstances may fairly be regarded as within the contemplation of the parties, and therefor within the terms of the instrument by which the tenant's interest was created.¹⁰

§ 66. Permissive Waste.— Failure on the part of tenants for life or for years to make such reasonable repairs as will prevent the buildings from falling to ruin and decay is permissive waste. This duty to repair does not include rebuilding either the whole or a substantial part of a building, nor the making of the substantial or general repairs necessary to maintain the premises in the condition in which they were at the beginning of the tenancy. If a window should blow in, or shingles or boards should blow off, the tenant must make such repairs as may be required to keep out the wind and rain, and thus prevent the waste and decay of the building which would otherwise result.¹ He is not required to put on a new roof,² or to repair buildings which were ruinous at the beginning of the tenancy.³

9. Doherty v. Allman, 3 App. Cas. 709; Klie v. Van Broock, 56 N. J. Eq. 180, and cases in note 5 preceding.

10. Melms v. Pabst Brew. Co., 104 Wis. 7; Doherty v. Allman, 3 App. Cas. 709 (the court refusing to enjoin the tenant from changing storehouses into dwellings, the property having become valueless for storehouse purposes); Klie v. Van Broock, 56 N. J. Eq. 180; Sherrill v. Connor, 107 N. C. 630.

1. Comyn, Land & T., p. 188; Ferguson v. ———, 2 Esp. 590; Syndham v. Jackson, 54 N. Y. 450; Sarles v. Sarles, 3 Sandf. Ch. 601; Moore v. Townshend, 3 N. J. L. 284; Clemence v. Steere, 1 R. I. 272; Wilson v. Edmonds, 24 N. H. 517; Miller v. Shields, 55 Ind. 71; Harvey v. Harvey, 41 Vt. 373.

2. Ferguson v. ———, 2 Esp. 590. But see, *contra*, Matter of Steele, 19 N. J. Eq. 120.

3. Clemence v. Steere, 1 R. I. 272.

The burning of buildings through the negligence of the tenant is treated as permissive waste,⁴ though it would seem that negligence in guarding and caring for fires, amounting as it does to affirmative wrong, should be treated as voluntary waste. Since tenants at will are not liable for permissive waste, this classification of negligent burning has led to the anomalous holding that a tenant at will is not liable for his negligent burning of a building on the premises,⁵ while in the same jurisdiction it was held that such a tenant was liable for placing too great weight in a barn on account of which the floors and other parts of the barn gave way.⁶ There is no question but that tenants for life and for years are liable for the burning of buildings on the premises through their negligence.⁷ There was at first some question as to whether such tenants were not liable for the destruction by fire of buildings arising from mere accident without negligence or wrong on the part of the tenant or anyone else, but in England it was settled by statute that tenants are not liable for such accidental burning,⁸ and it is well settled in the United States that in the absence of negligence or wilful wrong on their part or on the part of some stranger they cannot be held.⁹

§ 67. **Waste in Equity.**—The jurisdiction of equity over waste must be considered with reference to two distinct classes of cases. (a) Equity will enjoin threatened acts of waste on the part of tenants for life or for years.¹⁰ (b)

4. *U. S. v. Bostwick*, 94 U. S. 53; *Lothrop v. Thayer*, 138 Mass. 466; *Sampson v. Grogan*, 21 R. I. 174; *Earle v. Arbogast*, 180 Pa. St. 409.

5. *Lothrop v. Thayer*, 138 Mass. 466.

6. *Chalmers v. Smith*, 152 Mass. 561.

7. *Clark v. Foot*, 8 Johns. (N. Y.) 421; *Wainscott v. Silvers*, 13 Ind. 497; *Anderson v. Miller*, 96 Tenn. 35, and cases cited in note 4 preceding.

8. St. 6 Anne, c. 31; 14 George III, c. 78.

9. See cases, notes 4 and 7 preceding.

10. *Hext v. Gill*, 7 Ch. App. 699; *Jackson v. Cator*, 5 Vesey 688; *Fortescue v. Bowler*, 55 N. J. Eq. 741; *Douglass v. Wiggins*, 1 Johns. Ch. (N. Y.) 435; *Robertson v. Meadors*, 73 Ind. 43; *Disher v. Disher*, 45 Neb. 100.

Equity will enjoin threatened acts of destruction to property in several cases in each and all of which the acts threatened would not amount to legal waste. The term "waste" is applied to these acts, which has led to some confusion. In the first class of cases equity is dealing with legal waste, in which an action at law to recover damages for waste could be maintained. In the second class of cases no action at law for damages would lie, as the acts of destruction would not be waste in the legal sense. Waste of this kind, recognized as such only in a court of equity, is called equitable waste. In the case of a tenant for life or for years holding under a lease, deed or will which gives him an interest in the property "without impeachment of waste," no action for any act of destruction, however flagrant, could be maintained against him by the remainderman or reversioner, since by the express terms of the instrument creating his estate he is authorized to do anything which would otherwise amount to waste. A court of equity, however, interprets the expression "without impeachment of waste" to mean that the tenant may cut timber, open mines and generally do that which would otherwise amount to waste, but with this limitation, that he shall not commit any unconscionable act of waste, such as destroying the dwelling, cutting down shade trees, etc., but must limit his acts to such a use of the land as the average owner in the reasonable exercise of prudent management would exercise.¹ So, also, in the case of a conditional limitation, as where property is devised to A in fee, but if A should die without issue the property shall go to B in fee, equity will enjoin A from unconscionable acts of destruction of the same kind, not coming within the limits of a reasonable user of the land by an owner of average prudence.² Another case where

1. *Vane v. Lord Barnard*, 2 Vern. 738; *Rolt v. Somerville*, 2 Eq. Cas. Abr. 759; *Stevens v. Rose*, 69 Mich. 259; *Clement v. Wheeler*, 25 N. H. 361.

2. *Turner v. Wright*, 2 De Gex. F. & J. 234.
Tenant in tail after possibility of issue extinct is not liable for waste, yet having an estate of inheritance, yet

equity intervenes is in the case of a mortgagor who will be restrained from acts which will tend to impair the security of the mortgagee.³ These are all cases of so-called waste which are not recognized as waste in a court of law, and no action would lie at law for relief. Legal waste can be committed as we have seen, only by a tenant for life or for years, including tenants from year to year. There is no question of legal waste involved in any of the above cases. These cases have to do with the jurisdiction of equity and turn on purely equitable doctrines and therefore require no further consideration here.

§ 68. Ownership of Timber, Buildings, etc., Wrongfully Severed.—Timber or a fixture or building wrongfully severed by a tenant becomes at once the property of the owner of the first estate of inheritance.⁴ The tenant, however, is entitled to whatever he rightfully severs, and in the case of timber blown down by a storm, he is entitled to so much as he would have had a right to cut, while the owner of the first estate of inheritance gets the balance.⁵

equity will restrain such tenant from unconscionable acts of destruction on the same principles. *Williams v. Day*, 2 Chan. Cas. 32.

3. *Williams v. Chicago Ex. Co.*, 188 Ill. 19; *Hamilton v. Austin*, 36 Hun 138.

4. *Bewick v. Whitfield*, 3 P. Wms. 267; *Luchington v. Bolderno*, 15 Beav. 1; *Mooers v. Wait*, 3 Wend. (N. Y.) 104; *Lester v. Young*, 14 R. I. 579;

White v. Cutler, 17 Pick. (Mass.) 248; *Johnson v. Johnson*, 18 N. H. 594.

5. *Bateman v. Hotchkin*, 31 Beav. 486; *Herlakenden's Case*, 4 Coke 63a; *Bowle's Case*, 11 Coke 79b; *Clement v. Wheeier*, 25 N. H. 361; *Keeler v. Eastman*, 11 Vt. 293; *Dawson v. Coffman*, 28 Ind. 220; *Warren Co. v. Gans*, 80 Miss. 76; *King v. Miller*, 99 N. C. 583.

CHAPTER III.

FREEHOLD ESTATES.

A.—Development of Freehold Estates.

§ 69. **Nature of Estates in Land.**—The term “estate,” as used in connection with the law of real property, signifies, not the land itself, but the interest in the land which the owner has, the nature, extent and duration of his ownership. Thus one having a life estate in a specified parcel of land has an estate or interest in the land which is measured by the duration of his life; a tenant for years has an estate or interest in the land which will end with the expiration of his term; while a tenant in fee simple has an interest which is unlimited and absolute. Estates for life, in fee simple and estates tail are freehold estates, while tenancies for years and all interests less than a life estate are called estates less than freehold, and as we have seen, are regarded as merely chattel interests in land, termed chattels real.¹

§ 70. **Estates in Land Before the Norman Conquest.**—The Anglo-Saxon customary law, as it was developed by the Germanic tribes which invaded England and conquered the ancient Celts and Britains, forms the earliest beginnings of the modern law of real property. It is probable that the Angles and Saxons took with them into England the essential features of land holding practised by them on the continent.² There seems to have been at first little or

1. See § 22, *ante*.

2. Digby Hist. L. R. P. (5th ed.), 1-4. For an account of the probable way in which the Saxon conquest was accomplished and the way in which land was at first held by the conquerors, see Digby Hist. L. Real Prop., pp.

4-11. The conclusion drawn by Digby is as follows: “On the whole, therefore, we may conjecture that as a general rule the different bodies of settlers divided the land into townships or districts bearing the main features of the Teutonic community, that prob-

no trace of the feudal system of holding from an overlord which subsequently developed on the Continent of Europe. During the Anglo-Saxon period grants of land were commonly made by the king as chief of the community with the concurrence of the Witanagemot or Witan, made up of the great men and chief ecclesiastics of the kingdom. Such land was termed bookland, because granted by the use of a "book" or charter. These grants were most frequently made to religious bodies, the grants to individuals being principally to the king's thegns. This land was held by alodial holdings, viz.: in absolute ownership subject to no superior and to no service or charge, except that it was subject, like all land of the kingdom, to the duty of rendering military service and of repairing bridges and fortresses. These duties were, however, in no sense feudal, but were rather incidents of government.³ Bookland could be freely conveyed by the holders during their lives, or devised by will. In case of intestacy it descended to the children in equal shares, the law of primogeniture not existing in Saxon times. The right to convey and to devise by will could be limited and controlled, however, by the form of the grant or charter, and the descent of the land could in the same manner be limited to lineal descendants or to heirs male or female.⁴

All land not so granted by "books" or charters was termed folkland. This included land occupied by communities subject to customary law which had never been granted by "book" or charter, but over which such communities had acquired rights by settlement and occupation; and also wild and unoccupied lands from which grants might be made by the king and Witan as representatives

ably a large district was allotted to the leader as his domain, and perhaps smaller districts to the king's immediate followers.

"Over and above the land thus settled would be a large amount of sur-

plus land, increased perpetually, as the boundaries of the occupied territory are enlarged, by further conquests." (Digby, p. 11.)

3. Digby, pp. 11, 12, 13.

4. Digby, 13, 14.

of the kingdom. There is very little information to be had as to the way in which folkland was held, and the relations existing between the community or its chief and the person in actual possession. It is probable, however, that the incidents of such holdings, and the duties attaching thereto, were based rather on the idea of community of interest among the members of each community, by means of which their mutual rights and those of their chief were worked out and exercised, than upon any idea of feudal relationship. Folkland descended from ancestor to heirs, was probably not subject to alienation, except with the king's consent, and apparently could not be devised by will.⁵

Any proprietor of land could permit another to have the beneficial use of it with rents reserved payable in produce, labor or money. The ownership of the property was not thereby transferred, the tenant acquiring only a right to use and enjoy the land in accordance with the terms of the agreement. This was called *laenland*, and might be for a life or lives, or for a definite period, and is the beginning of the modern relation of landlord and tenant.⁶

During the latter part of the Anglo-Saxon period the germs of the feudal relation in England seem to have been formed. Large holdings of land were held by the thegns of the king and other great men, and the parts not within the actual possession of these men were occupied by tenants who held subject to the payment of rents or dues to the lords or great men to whom the land had been granted. The relation of lord and man between the chief and the members of the community existed in some form from the beginning, and this relation came to be more and more identified with the relation of each to the land.⁷ The Anglo-Saxon system of land holding grew through the development of local customs and laws little influenced by the forms

5. Digby, 15-18; 1 Pol. & Mait. Hist. Eng. Law (2d ed.), 61.

6. Digby, 16. 49, 50.

7. 1 Poll. & Mait. Hist. Eng. Law (2d ed.), p. 61; Digby Hist. & Law R. P. 19-25.

of the feudal system which had become generally established on the continent of Europe before the Norman invasion. The forms and ideas of the feudal system were entirely absent, though the rendering of dues and services to the lord as incident to the holding of bookland by tenants had come to exist to a very considerable extent shortly before the conquest.

§ 71. Introduction of Feudalism by the Norman Conquest.—The feudal system, which had become firmly established among the Normans, and in many divergent forms throughout the Continent of Europe, at the time of the Norman conquest, involved two main purposes: first and principally the rendering of military and other services by the tenant to his over-lord, and second and incidentally the giving of protection of property and person by the over-lord to the tenant. Under this system the final or ultimate property in land was in the king. His chief men held great districts of the land of the kingdom from him as his vassals, subject to the duty of rendering military and other services to him. These great men, or lords, in turn granted the land to their retainers or vassals, who in turn might, and generally did, distribute their portions in the same way to their dependents and vassals, subject to the duty on the part of the vassals of rendering military and other services to their over-lord in each case, the over-lord giving protection of person and property to them in return. In this way the enforcement of law and order and the maintenance of a military system to repel invasion or overthrow rebellion were identified with the holding of land. The tenant in actual possession of a parcel of land, after the feudal system was fully developed, was owner of it, having the absolute right to its possession and control, his interest differing from alodial ownership only in this, that it was subject to the rendering of military and other feudal services to the over-lord, from whom he held the property.⁸

8. Maine's *Ancient Law* (1st Am. ed.), 286-294; Digby 30, 31.

On the conquest of England in 1066 by William the Conqueror, the Normans brought with them this system of land holding and of government, and it was quickly established in England and extended to most of the land of the kingdom. This was not accomplished all at once by kingly fiat, or the like, but was the result of conditions existing after the conquest, and the action of social, economic and political forces which united to bring about this result.⁹ At the time of the conquest the Anglo-Saxon king was owner individually of extensive tracts of land. The unoccupied land of the kingdom was also his as head of the nation, subject to be "booked" or granted by him and the Witan. As conqueror, William succeeded to all this, the unoccupied lands becoming his absolutely, under the rules of the feudal system. By the law of both England and Normandy all land held by those who had resisted him was forfeited to him. In this way he became owner of a very large part of the lands of England. These lands were granted to his followers, who became his tenants or vassals, bound to render to him military service, and subject to the usual feudal incidents in accordance with Norman customs. In addition to this, Anglo-Saxon landholders who had escaped forfeiture, in many cases surrendered their land to the king to receive it back from him subject to military service, homage, and the other incidents of feudal holdings. By the time of Henry II the feudal system was well established in England, and most of the land of the kingdom was held by feudal over-lords.¹⁰

§ 72. Nature and Incidents of the Feudal System.— The feudal system, as it was developed in England after the Norman conquest, was really a system of government having for its foundation the ownership and enjoyment of land, on which the people of the kingdom depended almost ex-

⁹. 1 Poll. & Mait. Hist. Eng. L. (2d ed.), 79, 80; Digby 32, 33.

¹⁰. Digby 34, 35.

clusively for their livelihood. The means of enforcing the law of the land, of repelling invasion and putting down rebellion, were secured by making military service to the king a duty attendant upon the holding of land, so that a continuance of such holding depended upon a faithful discharge of such service. In this way the king always had at his command the means of quickly raising an army for any military service, and the overlords had the power and means wherewith to put down disorder and to punish and prevent lawlessness. By bringing himself within the system, and making himself vassal to the overlord, the tenant acquired the right to protection from him. In other words he secured the benefits of the protection afforded by law and government in return for the feudal services to which he was bound, and was made secure in his possession and enjoyment of his land.

The fundamental principle of the feudal system was that all the land of England belonged to the king; in the king alone was to be found the allodial, or final or ultimate title. In theory, and to a great extent in practice, as we have seen, all the land of the kingdom was granted by the king to the chief men or overlords to be held by them as the king's vassals or tenants. These in turn divided their portions respectively among others who thus became their tenants or vassals. These tenants might divide their holdings among others holding under them. This process of subdividing or regranting the feuds or interests granted to tenants was called subinfeudation. Chief above all stood the king as the only final or allodial owner. His immediate vassals, the great men or their successors to whom the king had granted the land, were called tenants in *capite*, or in chief. The final tenants who actually held possession of the land were called tenants paravail, and held, as it was termed, in demesne. Those standing between the king and the tenants paravail holding in demesne, were called mesne lords. Tenants paravail, the last of the series, hold-

ing the actual possession of the land in demesne, were entitled to its exclusive enjoyment and might use it or abuse it as they pleased, subject only to the feudal service incident to their tenure. Even the lord from whom the tenant in demesne held the land could not enter and oust the tenant without a judgment. If he did so he was guilty of a disseisin. If a third party entered and ousted the tenant, the injury was to the tenant, not to the lord. The right to enjoy and control the property was in the tenant alone, and therefore he alone was owner in the sense in which we understand ownership today, subject only to the feudal dues and services which bound him as holder of the land.¹

The overlord had rights in the land, but these were not rights of dominion; they were rather rights arising out of the dues and services which were attached to the holding of the tenant. In turn the rights of the lord from whom the tenants' immediate overlord held were rights which theoretically attached to the land, but they were not rights of dominion, or ownership, but rights enforceable only against the lord holding from him as tenant, and not against the tenant in demesne. Each of the mesne or middle lords had rights in the land, and each may be said to have "held" the same piece of land, each holding from his immediate overlord, but the rights and duties arising from such holdings were rather rights to services and dues, and in no way involved any right of dominion or ownership in the land.² This complicated situation continued till subinfeudation was done away with by the statute *Quia Emptores*, which is discussed in another place.³

Land to be held of a superior was granted by words of pure donation, *dedit et concessit*, perfected by corporeal investiture by open and notorious delivery of possession in the presence of other tenants of the neighborhood who

1. 2 Bl. Com. 53-59; 1 Poll. & Mait. Hist. Eng. L. (2d ed.), 233; Williams R. P. (17th ed.), 44-46.
 2. Williams R. P. (17th ed.), 71, 72; 2 Poll. & Mait. Hist. Eng. L. 2-6.
 3. § 75, *post*.

might afterwards be called upon to bear witness to the grant in case of dispute. The tenant or vassal was required to take the oath of fealty, or faithfulness, to his lord. He also usually did homage to the overlord, at the time of the grant, "openly and humbly kneeling, being ungirt, uncovered, and holding up his hands both together between those of the lord, who sate before him; and there professing that he did become his man, from that day forth, of life and limb and earthly honor, and then he received a kiss from his lord."⁴

§ 73. **Tenure.**—The holding and manner of holding lands by a tenant from his overlord under the feudal system is called tenure. In England the king alone held land allodially, that is absolutely, holding from no superior. All others, as we have seen, held mediately or immediately of the king. This system of tenure extends to every acre of land held in the kingdom. The forms of tenure which developed under the feudal system differed principally in the nature of the services or dues which attached to the tenant's holding of his land. Thus tenure in chivalry, or by knight-service called for military services on the part of the tenant. This was the most ancient and honorable of all the different forms of tenure. The tenant or knight was required to render to his lord, and through his lord to the king, a definite amount of military service, limited to 40 days each year. As the maintenance of wars of any magnitude could not be waged with soldiers serving for only forty days, the practice of paying scutage, viz.: a sum of money in lieu of military service, with which to hire soldiers, grew up at an early date to the exclusion of the rendering of personal military services.⁵ The need of money on the part of the overlord led to the development of other incidents of military tenure calling for the payment of money. The earliest

4. 2 Bl. Com. 53, 54.

5. Digby Hist. L. R. P. (5th ed.), 39, 130, 131.

of these were called reliefs, viz.: the payment of dues by the heir of a tenant in order that he might be allowed to hold the land after the tenant's death. By the feudal theory the admission of the heir to the land of his ancestor was a favor to be paid for, but one that could not be denied if the relief, or dues payable to the lord on the heir's entry and rendering homage, was duly paid.⁶ The payment of aids was another incident attaching to military tenures. Though at first exacted by the lord in a very loose way, and for various purposes, the injustice of the exactions made upon tenants in this form caused the enactment of statutes which limited aids to three cases, (1) to ransom the person of the lord when he was captured by an enemy, (2) to supply a marriage portion or dowry for his eldest daughter, and (3) to meet the expense of conferring the order of knighthood upon his eldest son. The amount required from each tenant was also restricted in the two latter cases, but in the case of ransoming the lord's person, the amount was left to be determined by the necessity of each case.⁷

The incidents of wardship and marriage became rights of the greatest importance to the lord and constituted the heaviest burden to the tenant. If the feud or fee descended to a male heir under the age of twenty-one, or to a female heir under the age of fourteen, the lord was entitled to the possession and enjoyment of the land, and of the income therefrom during the heir's minority, without obligation to account therefor, his obligation being to make reasonable use of the land, and to commit no waste. During the heir's minority the lord was also guardian of his or her person, and he was obliged to support and educate his ward out of the income derived from the land so held. Wardship continued as an incident of tenure until abolished by 12 Car. II,

6. Digby 40; 2 Bl. Com. 65, 66; 1 Poll. & Mait. Hist. Eng. L. (2d ed.), 308.

7. Digby Hist. L. R. P. (5th ed.), 41; 1 Poll. & Mait. Hist. Eng. L. (2d ed.), 350; 2 Blackstone 64.

ch. 24. The right to control the marriage of such wards grew out of the right of wardship. The lord could select the person to whom the ward was to be given in marriage, and in case the ward (male or female) refused to enter into the proposed marriage, he or she forfeited to the lord an amount equal to the value of the marriage to him, viz.: the amount the lord was to receive from the proposed suitor in return for the marriage with the ward. There was clearly no feudal justification of this incident of tenure, and its existence must be attributed solely to the avarice of the great lords through whose power it became established as a property right.⁸

The right of escheat was the lord's right to become full and complete owner of the land on the tenant's death without heirs. As between lord and vassal this right depended entirely upon tenure. The tenant held an estate only, holding from his overlord as superior, and therefore even an estate in fee simple, capable of being inherited forever, necessarily came to an end on the death of the tenant without heirs, and vested in the lord as owner, holding from his overlord, the king.⁹ This right of escheat exists today in every American state as an incident of sovereignty, entirely apart and distinct from any feudal principle.¹⁰

It is clear that the collection and payment of scutage instead of the rendering of personal military service, and the enforcement of the various and vexatious exactions above described, changed completely the character of military tenures, and made them as undesirable as they were at first superior and honorable. They were finally abolished by statute,¹¹ and tenure in socage, which had been constantly gaining ground on military tenure, took their place.

Tenure in socage took its origin, undoubtedly, from Saxon

8. Digby 41, 42; 2 Bl. Com. 67-69.

9. Digby 43; 2 Bl. Com. 72.

10. 3 Kent's Com. 512, 514; Reeve's Real Property, § 290.

11. 12 Car. II, ch. 24.

holdings heretofore described, in which tenants held free from feudal burdens except the obligation of paying to the overlord a fixed sum, or a certain amount of produce, as rent. Tenants in socage were free from the obligation of rendering military service or paying scutage as a substitute therefor, and in general were free from the incidents of military tenures which were uncertain and indefinite. The certainty and definiteness of the rent charge or service were its chief characteristics, the term socage evidently expressing this freedom of the socage tenant from the uncertain burdens of military tenures.¹²

Tenants by free and common socage tenure were required to take the oath of fealty and generally, though not necessarily, to do homage to the lord. They were also subject to the incidents of relief and aids, as above described in connection with military tenure. The relief usually took the form of double rent for the year following the ancestor's death. The incidents of wardship and marriage never attached to socage tenure. The guardian in socage of infant heirs was the oldest male relative, and he was subject to an accounting for the rents and profits of the lands when the infant heir became of age.¹³

By statute (12 Car. II, ch. 24), relief, aids, and all other feudal incidents of socage tenure were abolished, except fixed rents, guardianship in socage and escheat, which were expressly preserved. It also left the oath of fealty subject to be demanded at any time.¹⁴

Burgage tenants were tenants holding lands by socage tenure in towns. The ordinary incidents of socage tenure attached, subject, however, to certain local customs which came to be recognized as attaching to lands held in this way, particularly with reference to their descent and disposition by will. Before the first statute of wills and after feudalism became established, land could not be devised by will. But

12. Digby Hist. L. R. P. (5th ed.), 45-48; 2 Bl. Com. 75, 78.

13. 2 Bl. Com. 86-89; Digby 45-48.

14. Ibid.

most of the land held in burgage tenure could be devised by will by force of local custom just as before the conquest, local custom prevailing to this extent over feudal rules. In some cases the widow, by similar custom, was endowable of all her husband's land, instead of one-third thereof. One of the most remarkable of burgage tenures was called borough English, the youngest son inheriting instead of the eldest, by virtue of local custom.¹⁵

Gavelkind tenure was a species of free socage tenure which existed in the County of Kent. This tenure may be traced very clearly from Anglo-Saxon holdings, feudalism in this instance having imposed very few of its burdens. Besides being subject to a fixed and certain rent, lands held by this tenure descended equally to all the sons of the tenant, could be devised by will, and did not escheat to the lord in case of attainder for felony.¹⁶

Villienage; Copyhold Tenure.—Besides the freehold tenures above described there was another large and important class of tenants who held land, not as freemen and freeholders, but as villiens or slaves, being bound to render base services to the lord in return for their holdings, such as the ploughing and cultivating of his land retained by him for his over immediate use and enjoyment. They belonged to the manor, could not leave it, might be beaten and punished by the lord at his pleasure, so long as he committed no violent crime against their persons or did them no serious personal injury. They held at first at the lord's will and pleasure, but gradually customs developed in connection with their holdings, which customs became matters of record on the rolls of the court of the manor in which they enjoyed their holdings. The king's courts gradually came to recognize these customs and to enforce them. By this time such tenants had become free, and were able to enforce

15. Digby Hist. L. R. P. (5th ed.), 47, 48.

16. Digby 47, note 2; 2 Bl. Com. 84; 2 Poll. & Mait Hist. Eng. L. 272.

their rights against the lord in the king's courts. A copy of the rolls of the manorial court was the only evidence such tenants had of their title and rights in the land. For this reason they were called copyholders, holding by copyhold tenure. Therefore a copyhold estate is one which was originally held in pure villenage at the will of the lord, but which has become modified and changed by customs which fix and establish the respective rights of the lord and tenant, those customs being evidenced by the rolls of the manorial court, and enforceable against the lord by action of the tenant in the common law courts. In time copyhold tenures came to have the same characteristics as free tenures, except as modified by local customs of the manor.¹⁷

Grand Sergeanty, Petty Sergeanty, Frankalmoin. Besides the tenures heretofore mentioned there existed tenure by grand sergeanty, in which case land was held of the king subject to the duty of rendering to him some personal service of an honorary character, such as to bear his sword or banner, to act as his messenger, forester, butler, chamberlain, and the like. Tenure by petty sergeanty existed where personal services of a like nature were rendered by a vassal to a lord as incident to the holding of land from him.¹⁸ Another, and very important tenure, was frankalmoin, and was the holding of land by a religious person, body or corporation, the dues being spiritual, such as the saying of prayers, the solemnizing of masses and the like for the soul of the donor or of others. No money dues or military service of any kind attached to this form of tenure. The spiritual services to be rendered were enforceable as a matter of church discipline, but in no way by the secular courts.¹⁹

17. Digby 50, 51, 288-295; 2 Bl. Com. 93, 95-98.

18. 2 Bl. Com. 73; 1 Poll. & Mait. Hist. Eng. L. 287-290.

19. 1 Bract. 207; 2 Bl. Com. 101, 102; 1 Poll. & Mait. Hist. Eng. L.

(2d ed.), 240-244.

§ 74. **Manors.**—The practical operation of the feudal system, and the way in which the different kinds of tenure were employed may be best understood from a consideration of the manorial system. We have seen that before the conquest large districts of land were held by king's thegns or great men, and were occupied by tenants holding small parcels for which rent or other service was paid or rendered.¹ After the conquest these districts were either forfeited and granted by the king to his chief men, or they were surrendered and received back from the king as supreme lord. Most of the land of England, though not all, was granted in this way, originally by the king, in great districts, to the great men of the kingdom. A district so granted was called a manor. Of this the lord retained a portion for his house or castle and for his own exclusive possession and use, called his demesne. Another part of the manor was granted to the lord's freemen, holding by military tenure or knight service, and by free socage. A third part was placed in the possession of villeins, or vassals who were not freemen, as above described. The balance of the manor was left unoccupied as waste land, to be used in common by lord, vassals and tenants in accordance with the customs of the manor. There was no demarcation of fixed portions for each purpose. Lands granted to freemen might be and undoubtedly were separated, as to parcels, by lands placed in the possession of villeins, or lands left waste, as the convenience and mutual interests of the parties should require. It was usual for the lord to let part of his demesne lands to farmers to work it, rendering rent in produce or money, pursuant to a covenant or lease, binding only as between the parties, creating no estate as to third parties, but simply giving rise to mere contractual rights as between the farmer and lord, in no way, therefore, amounting to socage tenure.² Sometimes sev-

1. See § 70, note 6, *ante*.

2. Digby Hist. L. R. P. (5th ed.), 49, 50.

eral manors were held by a single lord, in which cases a single court was usually maintained for all the manors, such court being the court of each manor.³

The Manorial Court, called Court Baron, was maintained by the lord, through which court offenses committed by tenants and others within the manor might be punished, and controversies arising between tenants might be settled. This court exercised a jurisdiction over the manor and its people which was partly ministerial and partly judicial. Property rights of tenants were determined, customary rights declared and rights of common passed upon. The records of the manorial court, showing the customs of the manor and the rights of the tenants who were not freeholders, were the sole evidence of title that copyhold tenants possessed.⁴

§ 75. Creation and Transfer of Freehold Estates Under Feudal System; Seisin.—During the Anglo-Saxon period book-land held allodially could be transferred by the owner during his life, and by will at his death. The transfer of folklund by grant and its disposition by will were hampered by customs attaching to such holdings, as has been already pointed out.⁵ When feudalism became established the right to dispose by will of land held by feudal tenants or vassals was lost, since it was regarded as repugnant to the feudal relation to permit vassals to will the land to persons who might be strangers to the lord, perhaps his enemies. Not until the Statute of Wills was enacted (32 Henry VIII, ch. 32, § 1), was the power to dispose of land by will restored

3. Digby 43-53; 2 Bl. Com. 90; Poll. & Mait. Hist. Eng. L. (2d ed.), 364.

4. Digby 52-55.

"In particular, it seems to us that the men of the time would generally have argued from the court to the manor, rather than from the manor

to the court, and would have said, 'A single court is held for it, therefore it is a manor,' rather than 'It is a manor and therefore it has a court.'" 1 Poll. & Mait. Hist. Eng. L. (2d ed.), 605.

5. See § 70, *ante*.

to feudal tenants. As we have already seen, the power of disposition by will was preserved by special custom in certain cases of tenants holding by burgage tenure and gavel-kind tenure.⁶ Absolute alienation *inter vivos* under the feudal system was subject to the consent and approval of the lord, and was so hampered by restrictions that the process of subinfeudation, heretofore explained,⁷ was resorted to by tenants. This resulted in serious loss to the lords. Thus when a tenant or vassal transferred his feud by subinfeudation to another, that other becoming his tenant, and owing to him as lord a service or payment in return therefore, all the overlord was entitled to in case of escheat, or in case the tenant died leaving an infant heir, was the rent or service reserved by the tenant from the sub-feudatory to whom he had subinfeudated the land.⁸ The danger to the feudal relation from this practice was obvious. It was provided by Magna Charta (1217) that "no free man shall henceforth give or sell so much of his land as that out of the residue he may not sufficiently do to the lord of the fee the service which pertains to that fee." This provision proved to be uncertain and inadequate, and to remedy the difficulty the statute *Quia Emptores*, or statute of Westminster III (18 Edw. 1, ch. 1), was enacted in 1290.

The Statute Quia Emptores is of the first importance in the history of the development of the law of real property. It did away absolutely with subinfeudation. It enacted that thenceforth it should be lawful for every freeman to sell at his own pleasure his lands and tenements, or part of them, so that the feoffee should hold the same lands and tenements of the chief lord of the same fee by such services and customs as his feoffor held before. The services were to be ratably apportioned in case only a part of the land held by the tenant should be transferred by him. The statute applies only to estates in fee simple, where the tenant trans-

6. See § 73, *ante*.

7. See § 72, *ante*.

8. Digby Hist. L. R. P. (5th ed.), 235.

fers his entire interest, and does not apply to the creating of life estates or any other estate less than fee with a reversion remaining in the grantor. In these latter cases tenure might still exist between the grantor as owner of the reversion and his tenant.

The result of the statute was that thereafter tenants might convey their feuds or estates at pleasure, the effect of the conveyance being to remove them absolutely from the feudal relation with the lord in so far as the land was concerned and to substitute in their places the persons to whom the land had been conveyed. These grantees or feoffees took the land subject to the same feudal dues and services as bound the tenant who made the feoffment. Thus the lords gave up their right to control alienation of the land and the consequent right of determining the persons who might hold under them, but received in return security in their enjoyment of their feudal rights freed from the dangers arising from subinfeudation.⁹

After the statute no new tenure could be created in lands already granted by the king, and the only new tenure which could possibly be created was by grant from the king to tenants in *capite*, holding directly from him. Therefore there could be no other manorial or mesne lords except those created before the statute and their descendants. Gradually as time has passed, and as the incidents which made the feudal relation of value to the lord have been swept away, the feudal relation of lord and tenant has disappeared, so that at present in England most of the land is held directly of the king without the intervention of a mesne lord,¹⁰ and the tenure existing is that of free and common socage.

9. Digby Hist. L. R. P. (5th ed.), 234-239; Williams R. P. (17th ed.), 79.

10. "Gradually by successive alienations the tie between the chief lord and the freeholder becomes weakened.

In socage tenure, when no rent was payable and no value attached to the service, there was no motive of keeping up the empty ceremony of fealty and thus in many cases the relation of lord and tenant became altogether ob-

Livery of Seisin.—A feud or fee was created or transferred by a deed of feoffment with livery of seisin. The ceremony of livery of seisin was a formal procedure the purpose of which was to impress upon the minds of the other freeholders of the manor, or of the same lord, who were present, the facts attending the conveyance, so that they might bear witness to what took place thereafter in case of dispute, “for in case of dispute as to the title to the lands, or the right to services, aids or reliefs, the fact of this open and notorious livery of seisin enabled the lord to appeal to the tribunal before which, since the reforms of Henry II, suits relating to land were commonly decided—the verdict of twelve *legales homines de vicineto*, who would know themselves or have heard from their fathers the truth of the matter.”¹¹ This ceremony consisted in the feoffor and feoffee going on the land to be conveyed and the delivering to the feoffee of a clod of earth, or a branch or twig on the land as a symbolical delivery of the land itself. It was a sufficient livery of seisin, however, if the two parties were actually present on the land and formal possession thereof was transferred by word or act. Even going in sight of the land to be transferred and giving to the feoffee power to enter as owner was a sufficient livery, provided an actual entry was thereafter made by the feoffee during the life of the feoffor.¹² A deed of feoffment was usually delivered

literated. Finally, when all the valuable incidents attaching to knight-service were abolished, and the tenure itself converted into socage by the statute of Charles (12 Car. II, c. 24), the relation between the freeholder and his lord fell into abeyance, and the freeholder became for all practical purposes owner of the soil. Thus at the present day in the great majority of cases no intermediate lord is recognized between the freeholder and the crown, except where the freehold is within the known precincts of a

manor, and the relation between the freeholder and the lord of the manor has been kept up by the recognition of mutual rights and duties, such as the payment of rents, or rendering heriots or other duties to the lord.” Digby Hist. L. R. P. (5th ed.), 235, 236.

11. Digby Hist. L. R. P. (5th ed.), 147.

12. Digby Hist. L. R. P. (5th ed.), 146, 147; Bracton, Lib. II, ch. 18, fol. 39.

to the feoffee at the same time, which defined the interest transferred or created, and the extent of the land conveyed. Only present estates in possession could be created or transferred by feoffment with livery of seisin. Future estates, easements and incorporeal interests not involving possession could be created only by deeds of grant, without livery of seisin. Hence the distinction between estates which "lie in grant" and estates or interests which "lie in livery."¹³

Seisin is a principle of the greatest importance in the law of property, both under the feudal system and during the entire history of the law of property down to and including the modern law. A person is "seised" who is in possession of the land in question, having therein or claiming to have a freehold estate. A freehold estate is, as we shall see,¹⁴ either an estate in fee or a life estate, these estates alone requiring livery of seisin for their creation *inter vivos*. A man in possession as tenant for a term of years, or under a license is not seised. He must be in possession as owner of an estate in fee simple or tail or a life estate. Actual possession by such a tenant is actual seisin. If a person is entitled to the immediate possession, not having as yet entered, he is said to have "seisin at law," provided the land is not in the adverse possession of another. A person in adverse possession, claiming to hold as freeholder adversely to the title of the record owner, is seised of the land, his seisin resulting from the disseisin committed against the true owner, who must enter and oust the disseisor, or recover the property by action at law, in order to recover his seisin.¹⁵

§ 76. Freehold Estates as Distinguished from Estates Less Than Freehold.—From what has been said heretofore it will be seen that a freehold estate is an estate of a free-

13. Digby Hist. L. R. P. (5th ed.), 260, 261; Co. Lit. 9a, 49a, 172a.

14. See § 76. *post*.

15. 2 Poll. & Mait. Hist. Eng. L. (2d ed.), 29-39; Digby Hist. L. R. P. (5th ed.), 108, 109.

man, holding under the feudal system from an overlord either as tenant in chivalry (military tenure) or by free and common socage, and not as a villein, serf, or mere contractual tenant. Such feuds in England after the conquest were at first estates in fee only, but later life estates were recognized as freehold estates held by freemen subject to the incidents of feudal tenure, and created or transferred only by livery of seisin. Estates less than freehold were not at first recognized as subsisting interests in land. A farmer to whom the lord of the manor might let part of his demesne land had only a contractual relation with the lord; he was not regarded as having any ownership of the land itself. He had no remedy against a stranger who might oust him, and he could not recover the land from the lord, should the lord oust him, his remedy being limited to an action for damages for breach of covenant. Later when by statute tenants for years were given the right to maintain and recover possession of their land not only as against strangers but against the lord himself, their interests came to be recognized as estates in the land, but estates of a lower nature not amounting to the dignity of a freehold, since they in no way involved any element of the feudal relationship. This interest, therefore, continued to be regarded as a contractual interest of a personal nature, not amounting to real estate, and is termed a chattel real. Estates less than freehold are, therefore, tenancies for years, from year to year, etc., and are treated as personal property, being personal interests in real property.¹ Freehold estates required livery of seisin for their creation, while estates less than freehold could be created by contract merely without livery or any other formality.²

§ 77. Tenure in the United States.—The land of the American colonies was held under royal grants, and the

1. 2 Bl. Com. 103; Williams R. P. (17th ed.), 70, 71; Digby Hist. L. R. P. (5th ed.), 176. 2. Ibid.

tenure under which it was held was that of free and common socage.* As the statute *Quia Emptores* undoubtedly applied to these grants, the only tenure which could exist was between the owners or holders and the king. After the revolution the various States succeeded to the king's feudal rights, and therefore any tenure existing in the United States exists only between the state and the owner and holder of the land. Every incident of feudal tenure has been abolished, no state has put forth any claim to feudal rights, and in some states, as in New York, it is expressly provided that the land of the state is held by allodial ownership, free from tenure in any form.³ The safe conclusion is, therefore, that tenure does not exist as a practical matter in the United States, but that the land is held allodially free from tenure and the incidents of tenure. The feudal term "escheat" is still used as expressing the reverting of land to the state on the death of the owner intestate and without heirs, but this is an incident of sovereignty existing without any connection with the escheat of the feudal system, which existed as a right of tenure, not as a right of sovereignty.⁴

B.—*Estates in Fee.*

§ 78. **Estates in Fee Simple.**—A tenant in fee simple is one holding land to himself and his heirs forever. It is the greatest estate in land which can be held, constituting absolute ownership. The original meaning of the word fee (feodum), as Blackstone points out, is synonymous with "feud" or "fief," and indicates a feudal holding from an overlord as distinguished from allodial ownership,¹ but this

3. N. Y. Const. Art. I, §§ 11, 12. Constitutions or statutes in many other states, including Connecticut, Ohio, Minnesota, Wisconsin, California, Virginia, West Virginia and Kentucky are to the same effect. In New Jersey, South Carolina and

Georgia tenure between the owner and the state is recognized by statute, but has no practical significance. See Reeves R. P., § 289.

4. 3 Kent's Com. 512-514; Reeves R. P., § 290.

1. 2 Bl. Com. 104.

original meaning has long since been lost. A fee signifies an estate of inheritance, an estate which will continue in the holder—his heirs and assigns, forever, subject only, under the feudal system, to the feudal bond of tenure, and subject today only to such remnants of tenure as continue to exist.² A fee simple, as distinguished from a fee tail, is an estate limited to a man and his heirs generally, no particular class of heirs being specified, while a fee-tail is an estate limited to one and the heirs of his body, only lineal descendants being capable of inheriting.

Since the fee represents absolute ownership which may continue for an infinitely long time in the owner, his heirs and assigns, it follows that no estate in the land can exist as a remainder or reversion after the fee. The owner may create a life estate, a term of years or even a fee-tail out of his estate in fee simple, and there will still remain in him a reversion in fee. In other words the fee may be divided into one or any number of particular estates, as estates less than fee are called, and a reversion retained by such owner, or he may transfer the balance of the fee to a third person at the same time the particular estate or estates are created, in which case such third person's interest is called a remainder in fee.

§ 79. Base or Qualified Fees; Estates Upon Limitation and Upon Condition.—A base or qualified fee is one which

2. 2 Bl. Com. 104, 105.

As stated by Mr. Williams. "In modern times the incidents which mark the relations of lord and free tenant of a fee, rarely occur in practice, and are an insignificant burden on the tenant and of small profit to the lord. For the latter now has no possibility of deriving any substantial benefit from his position except in the case of escheat, and this can only happen when the tenant dies intestate and without heirs." Williams R. P. (17th ed.) 70. It may be added that in Eng-

land all trace of the feudal relation, except between the owner in fee and the king, has been lost with reference to by far the greater part of the land, and that in the United States the relation does not exist, even in theory, in most states, and that in those states where it may still be traced as a theoretical principle, it has ceased to have any significance, the right of escheat being regarded as an incident of sovereignty inseparable from the state. See § 77, *ante*.

is made, by the deed or will creating it, subject to be brought to an end on the happening of some collateral event, as where land is granted to A and heirs until B returns from Rome, until Gloversville is incorporated as a village, as long as the property granted shall be devoted to the uses and support of religion, and the like. In such cases the entire fee passes to the grantee or devisee, subject, however, to be brought to an end and to revert back to the grantor or heirs of the deviser on the happening of the collateral event which is thus set up as the outer boundary or limitation of the estate.³ Base fees have been recognized by Blackstone, Kent, and most writers on the subject as valid and existing estates in modern times. It has been urged, however, that the statute *Quia Emptores* did away with these estates, and that when created after the statute they became estates in fee simple, the limitation being void. It is argued that the right of reverter from grantee to grantor, in case the limitation on which the estate depended should happen, was an incident of tenure in the nature of escheat between the parties; that the statute *Quia Emptores* did away with tenure as between grantor and grantee, and therefore did away with this right of reverter which depended upon tenure.⁴ In any case where land is held subject to feudal tenure this position is unquestionably sound though there is little or no authority in the English cases, touching the question. In the United States, in the few cases which have arisen, base fees, or estates in fee upon limitation, have been expressly recognized, the courts taking the position that as tenure either does not exist or has no significance in the United States, the argument in question can have no application to allodial ownership which prevails throughout the United States. There seems to be no good reason why an allodial owner may not

3. 2 Bl. Com. 109; 4 Kent Com. 9-11; Leonard v. Burr. 18 N. Y. 96; First Universalist Society, etc. v. Boland, 155 Mass. 171. 4. Gray, Perpetuities (2d ed.), §§ 32, 33, 36, 38, 39; Sanders, Uses, 200; Leake Land Law 35.

create an estate in fee which will revert to himself and his heirs on the happening of some event in the future by way of limitation upon the estate created. There is no question but that a limitation over to another person on the happening of a future contingency would be good as a conditional limitation under the modern statutes,⁵ and there would seem to be no reason why an express provision to the effect that the estate should revert to the grantor or his heirs should not be equally effective. The absence of such express provision should make no difference; it is clearly implied that on the happening of the limitation the estate should revert to the grantor or his heirs, and an express provision to that effect is unnecessary. One holding by absolute and allodial ownership is permitted to dispose of his property as he pleases, creating such interests therein as he may desire, so long as he violates no rule of law and the interest created or condition imposed is not contrary to public policy. There would seem to be no reason why he cannot create an estate in his land which will be determinable on the happening of some collateral event, and it would seem to be consistent with the modern principles of ownership that on the termination of such estate the property should become his again, even in the absence of tenure between himself and his grantee. In other words, the right of reverter may exist entirely apart from tenure as an incident of allodial ownership.⁶

As the statute *Quia Emptores* had no application to estates for life or tenancies for years it follows that estates for life or tenancies for years may always be made subject to collateral limitations on the happening of which the estate comes to an end, the land reverting to the reversioner or passing to the remainderman.

By modern usage base or qualified fees and other estates which are made subject to a collateral limitation are called

5. See §§ 250, 251. *post*.

Boland, 155 Mass. 171; Leonard v.

6. First Universalist Society, etc. v. Burr, 18 N. Y. 96.

estates upon limitation. They differ radically from estates upon condition in that they come to an end in and of themselves by the mere happening of the limitation on which they depend, while estates upon condition are not brought to an end by breach of a condition. Such breach gives to the grantor or his heirs, or the heirs of the deviser, as the case may be, the right to terminate the conditional estate by making an entry thereon for that purpose, or by starting an action of ejectment, which has the same effect as an entry. An estate upon condition is one made subject to forfeiture for breach of a condition contained in the deed or will creating the estate. Words of condition, such as "if," "on condition that," "provided that," are used. Compliance with the condition is enforced by the penalty of forfeiture. No idea of penalty or forfeiture is involved in an estate upon limitation. The happening of the future contingent event terminates the estate because it was the intent and purpose of the grantor or deviser that the estate should end on the happening of the limitation. Words of duration, such as "while," "during," "as long as," "until," are used in their creation.

The possibility of reverter on the happening of the limitation is all that remains in the grantor or heirs of the deviser of an estate upon limitation in fee. The possibility of a right of entry for breach of condition is all that remains in the grantor or heirs of the deviser of an estate upon condition in fee. In each case this possibility could not be assigned or conveyed at common law, and therefore could not be limited over to others on the termination of the estate upon limitation or condition. As these limitations and conditions may be applied to every kind of estate, in fee, for life and for years, and are not incidents of estates in fee alone, a consideration of them in detail is reserved for a later chapter.⁷

7. See Ch. XII and Ch. XVI, *post*.

§ 80. **Creation of Estates in Fee by Deed.**—At common law estates in fee, including estates in fee simple and estates in fee upon limitation, or base fees as they were termed, could be created by deed *inter vivos* only by the use of the word “heirs” in some operative part of the deed. No matter how clearly the intent of conveying an absolute estate in fee might be expressed, only a life estate would pass if the word “heirs” was not used. Thus a conveyance “to A and his issue forever,” “to A in fee simple,” “to A absolutely and forever,” “to A and his heir” the singular being used, would be effective in each case only as creating a life estate.⁸ The explanation of this technical rule is based on the historical development of the right to convey the interest held by a tenant under the feudal system. At first such tenants held subject to their over-lord’s pleasure, later the interest of such tenants developed into life estates; still later a grant to a tenant and his heirs was regarded as a life estate with an estate arising in the heirs of the tenant on his death. Soon after the establishment of the feudal system in England, following the Norman conquest, a grant to a tenant and his heirs had come to mean an absolute estate in the grantee or feoffee, the word “heirs” being regarded and used, not as a designation of a class of persons who were to take by virtue of the grant on the death of the tenant to whom the grant was made, but rather a word of limitation, limiting and describing the estate created in the tenant, as an estate, not limited to his life, but one which would continue in him or his heirs for all time. The word “heirs” was construed as including, not only those persons who might be the heirs of the tenant in fee at his death, but the heirs of such heirs in succession to the end of time. In its technical use, therefore, this word expressed and designated an estate which was to con-

⁸ Litt. 1; Co. Litt. 8b, 9a, 9b; 2 Bl. Com. 107-109; 4 Kent Com. 5-8; Fruesdell v. Lehman, 47 N. J. Eq. 218; Adams v. Ross, 30 N. J. Eq. 505; Saunders v. Haynes, 44 N. Y. 353.

tinue in the tenant and his heirs and the heirs of such heirs indefinitely for an infinite time. The need of absolute certainty, under the feudal system, of the nature and extent of estates created by grant led to the establishment of this rule that the word "heirs" alone would result in creating an estate in fee.⁹ The rule was highly technical from the first, and whatever practical reasons existed under the feudal system to justify it, there remained no reason for it after the early strictness of the feudal relation had become relaxed. After that system had been brought to an end all reason for the rule disappeared. Nevertheless it became so firmly fixed as part of the common law of land that it continued to be the law down to modern times, and in several jurisdictions it is still adhered to in all its strictness.

It was necessary that the word "heirs" appear in some operative part of the deed. If it appeared only in the covenants attached to the deed, such as the covenant of warranty, of seisin, etc., only a life estate would pass though there might be terms in the deed itself expressing an intention to transfer a fee. The covenants are not part of the deed, but are contracts attached to it; the deed would operate to transfer title just as effectively without as with such covenants.¹⁰ As between the granting clause and the habendum, in case of ambiguity, that construction must be followed which will reconcile and give effect to both. Thus if the granting clause is "to A," without further words of limitation, and the habendum clause is to "A and his heirs," a fee passes. So, also, if the granting clause is "to A and his heirs" and the habendum is "to A and the heirs of his body," an estate tail is created. In these cases the construing of both clauses together clears up the ambiguity and gives effect to both.¹¹

9. Co. Litt. 9a; 2 Bl. Com. 107; 4 Kent Com. 5-7; *Cole v. Lake Co.*, 54 N. H. 242.

10. *Adams v. Ross*, 30 N. J. Law 505.

11. See *Lancaster Bank v. Myley*, 13 Pa. St. at 551; *Saunders v. Haynes*, 44 N. Y. 353.

Where the two clauses are necessarily inconsistent, as where the granting clause is "to A for life," the habendum being "to A and his heirs," that construction will be taken which transfers the greater estate, the rule of construction applying that the deed must be construed most strongly against the grantor and in favor of the grantee. Therefore an estate in fee passes. The same result is reached and for the same reason where the granting clause is to A and his heirs, and the habendum to A for life.¹²

§ 81. Exceptions to Foregoing Rule.—Where a deed refers to a former deed or will which contains the word "heirs" as required to pass a fee, and purports to convey the same estate that was conveyed or devised by the instrument so referred to, an estate in fee is transferred though the word heirs be omitted. The incorporation specifically of the former instrument containing the word "heirs" results in the inclusion of that word in the deed in question.¹ Suppose A devises property "to B forever." Later B conveys the same land to C by deed which does not contain the word "heirs," but the deed recites that he grants to C the same estate that was devised to him by A's will. Though B took a fee under A's will, only a life estate passed to C, as the will in question did not contain the word "heirs" and its incorporation with the deed does not result in bringing that word into the deed to C.²

Grants to corporations do not contain the word "heirs" for obvious reasons. The entire fee of the grantor passes under such grants unless the intention to convey a smaller estate is expressly stated in the deed.

The word "successors" though generally used as a matter of practice, is not required, since corporations may continue to exist forever.³ Even in the case of a corporation

12. See § 318, note 6, *post*.

2. *Lytle v. Lytle*, 10 Watts (Pa.)

1. *Lytle v. Lytle*, 10 Watts (Pa.) 259.

3. *Nicoll v. N. Y. & Erie R. Co.*, 12

created for a definite number of years, the rule is the same since the corporation may have its corporate existence extended indefinitely, and a grant to it, unrestricted as to time, imports an estate to last forever, unless it is expressly stated that a smaller estate is conveyed, since such corporations, like those whose existence is perpetual, may own and hold estates in fee.⁴

Joint tenancies are of such a nature that one joint tenant may execute a release of his interest to his tenant in fee by deed of release without the word "heirs." The reason is that each joint tenant in fee is seised of each and every part of the property, not of a separate and distinct undivided interest therein, subject only to his co-tenant's right to enjoy the property with him. Therefore such deed of release operates only as a release or giving up of the joint tenant's right of enjoyment, leaving his co-tenant's interest or estate freed from this right of enjoyment. Such deed does not operate as a conveyance of the fee in a separate undivided estate in the land, as the fee as to every part was in the tenant to whom the release was made from the beginning of the joint tenancy.⁵ Joint tenants are seised as though all the joint tenants together constituted one legal person, or unity, each tenant being seised as a member of such unity, and each being entitled to exactly the same right of enjoyment and possession by virtue of his community of interest as a member of the fictitious unity.⁶ Tenants in

N. Y. 121; *Wilcox v. Wheeler*, 47 N. H. 488; *Wilksbarre v. Wyoming Hist. Soc.*, 134 Pa. St. 616.

4. *Nicoll v. N. Y. & Erie R. Co.*, 12 N. Y. 121.

At common law the word "succession" or other words of succession were necessary in conveyances and mortgages of estates in fee to a corporation sole, viz.: a corporation consisting of only one man existing as a

corporation by virtue of his holding a particular office, his successors in such office being the "successors" of such corporation sole. 2 Bl. Com. 167; *Chancellor v. Bell*, 45 N. J. Eq. 538.

5. Co. Litt. 9b; 4 Kent Com. 7; *Rector v. Waugh*, 17 Mo. 13.

6. See preceding note, also Ch. IX, *post*, on Joint Tenants and Tenants in Common.

common, however, are each seised of a distinct undivided share of the fee; therefore a deed of release by one tenant in common in fee to another must contain the word "heirs" in order to pass a fee, since such release amounts to a conveyance of a separate undivided interest in the land in fee.⁷

Property conveyed to a trustee will pass in fee though the word "heirs" be omitted if the trustee is required to have a fee in order to carry out the terms of the trust, as where he is directed to convey the property in fee.⁸

§ 82. Creation of Estates in Fee by Will.—Though wills of real property were undoubtedly valid before the establishment of feudalism in England by the Norman conquest, the introduction of the feudal system resulted in the destruction of the right, as the diverting of the tenant's feudal holding from his heirs by will was regarded as inconsistent with that system, interfering with the overlord's control of the tenant's holding and weakening the relation between lord and tenant by the possible introduction of strangers who might be hostile to the overlord, or who might not be as ready or able to render or perform the feudal dues incident to that relation.⁹ Furthermore, at first the interest of the tenant in fee was regarded as a life estate in the tenant with a right in the tenant's heirs to take from the overlord on the tenant's death. The payment of a relief by the heir to the overlord on his succession to the tenancy grew out of this notion.¹⁰ Therefore real property could not be disposed of by will during the continuance of the feudal system down to the time of the enactment of the first Statute of Wills, during the reign of Henry VIII.¹¹ The practice of

7. 4 Cruise, tit. 32, ch. 6, § 25; 3 Preston 48; *Rector v. Waugh*, 17 Mo. 84; *Fisher v. Fields*, 10 Johns. (N. Y.) 494, 505.

13. 9. Digby Hist. L. R. P. (5th ed.)

8. *Wilcox v. Wheeler*, 47 N. H. 488; 28; *Williams R. P.* (17th ed.) 80.

Newhall v. Wheeler, 7 Mass. 189-198; 10. See § 73, 80, *ante*.

Brooks v. Jones, 11 Metc. (Mass.) 11. 32 Henry VIII, c. 1; 34 & 35

conveying land to a trustee to uses to hold subject to such uses as might be expressed in the owner's will, on his death, grew up during this time as a means of avoiding this feudal restraint. This is discussed hereafter in the chapter on Uses and Trusts. Such uses were not recognized at law and could be enforced only in a court of equity.¹ By the time of Henry VIII the rigid rules and practices of feudalism were fast passing away. Military tenure and the relation of lord and man as incident to the holding of lands with the burdens attaching thereto had been largely displaced by socage tenure with the certain and definite payments by tenants to their overlords in lieu of military or other service which characterize socage tenure. Even these payments were coming to be regarded as of less importance. The natural tendency and the desire of the times were to get away from the rigorous and technical rules of feudalism, the reasons for which had mostly ceased to exist. Therefore when the courts were called on to construe wills of real property after the Statute of Wills, having a clear field unincumbered by precedents, since there had been no wills of land before that Statute, they decided that the intention of the testator, as expressed in the will, should govern, and therefore any word or expression in a will equivalent to "heirs" and expressing an intent to devise a fee, would have that effect as expressing the intent of the testator, even though the technical word "heirs" did not appear in the will. Therefore, after the Statute, a devise of

Henry VIII, c. 5. This statute permitted the disposition by will of all lands held by socage tenure or in the nature of socage tenure, and of three-fourths only of land held by knight service or military tenure. When in 1660 the statute, 12 Car. II. c. 24, did away with military tenure and substituted socage tenure therefor, all land was rendered alienable by will.

of Uses, enacted, 6 years before the Statute of Wills, operated to convert immediately all uses into legal estates in the *cestui que use*. This necessarily did away with the scheme of granting to a trustee to uses to be named in the owner's will, and the inconvenience resulting probably led to the enactment of the Statute of Wills six years later. Williams R. P. (17th ed.) 279.

1. See Ch. VIII. *post*. The Statute

real property "to A forever," "to A and his issue forever," "to A in fee," and the like were construed as passing estates in fee.² It was necessary that the testator's intent to devise an estate in fee rather than a life estate should be clearly expressed by language in the will itself, and would not be inferred from ambiguous expressions which might not have that meaning. Thus a devise of real property to A for life, and immediately after A's death to be equally divided among A's children did not give a remainder in fee to A's children, however reasonable such an inference might be from the context, since no term or expression of the will declared that such remainder was given to A's children in fee.³ The recitals in the introductory clause of a will such as "and as touching such worldly interest, etc., I dispose of the same as follows," or "and as for my temporal estate, I devise the same as follows, etc.," do not of themselves express an intent to transfer a fee, since they are equivocal and capable of a different interpretation. If such expressions are followed by others in the body of the will which construed together show such intent unequivocally, then an estate in fee will pass.⁴

§ 83. Creation of Estates in Fee Under Modern Statutes.

In England, New York, and a majority of the states of the United States statutes have been enacted which provide in effect both as to deeds and wills that the entire estate of the grantor or deviser passes under the deed or will unless the intent to transfer or devise an estate for life or other estate less than fee is expressly stated in the deed or will creating the estate.⁵ Therefore, since the enactment of

2. 2 Bl. Com. 107; 4 Kent Com. 7; (N. Y.) 452; Fox v. Phelps, 17 Wend. Bolton v. Bowne, 18 N. J. L. 210; (N. Y.) 393, 399; Bolton v. Bowne, Lincoln v. Lincoln, 107 Mass. 590; 18 N. J. Law 210.

Forsaith v. Clark, 21 N. H. 409. 5. 1 Vict. c. 26 § 28; 44 & 45 Vict. c. 41; N. Y. Real Prop. Law, § 245; Williams R. P. (17th Ed.), Hutchins Pa.) 476.

4. Wheaton v. Andress, 23 Wend. Am. Notes, 148.

these statutes in the jurisdictions affected, if the grantor or devisor has an estate in fee in the land affected by his deed or will, his entire estate passes thereunder though the word "heirs" or any equivalent word be omitted altogether, unless his intent to transfer or devise an estate for life or for years is expressly stated. Under these statutes the same rule applies to wills as to deeds in this respect. In some states the common law rule requiring the use of the word "heirs" in deeds is retained, while the statutory rule has been enacted with reference to wills, that the entire state of the devisor passes in the absence of an expressed intent to devise a lesser estate.⁶ It must be remembered that these statutes are not retroactive, and that the common law rules apply to all deeds and wills taking effect before the statutory change was made in each jurisdiction, and therefore in searching a title back to a time antedating the statute, deeds and wills taking effect before that time must be passed upon from the standpoint of the common law.

The jurisdiction of equity to reform instruments in case of mutual mistake of the parties must also be borne in mind. In case of a deed from which the word "heirs" had been omitted by mistake, the parties intending that a fee should pass, equity will reform the instrument by inserting the word "heirs," the effect being to make the deed effective as conveying the fee except as against subsequent innocent purchasers for value of the same property without notice of the mistake.⁷

6. Massachusetts, Connecticut, Rhode Island, New Jersey, Pennsylvania, Delaware and South Carolina are the more important of the small number of states which have so modified the common law as to wills but not as to deeds. 1 Stim. Am. St. L. §§ 1474, 2808. *Adams v. Ross*, 30 N. J. Law 505; *Trusdell v. Lehman*, 47 N. J. Eq. 218. In some states the

courts have decided, without the aid of statutory changes, that an estate in fee passes by deed if the intention to convey a fee is expressed in the deed, though the word "heirs" be omitted. *Cole v. Lake Co.*, 54 N. H. 242.

7. *Trusdell v. Lehman*, 47 N. J. Eq. 218; *Weller v. Rolason*, 17 N. J. Eq. 13; 4 Kent Com. 7, 8.

C.—Estates In Fee Tail.

§ 84. **Conditional Fee.**— A conditional fee at common law was created by a conveyance to a man and the heirs of his body, or to a man and the heirs of his body male, or by any conveyance with similar words of procreation limiting the inheritance to the issue of the grantee and their issue in the direct line of lineal descent. This fee, like other qualified fees, carried with it the entire estate of the donor, leaving no reversion in him, but the donee took it subject to the contingency that children be borne to him. Only the children of the donee could take such a fee by inheritance, and the children of such children in turn, so that if there should be at any time a failure of the direct line of lineal descent the estate would come to an end and escheat back to the donor or his heirs provided there had been no alienation of the fee after birth of issue to the donee. On the birth of issue to the donee the contingency which made the fee conditional was removed and the donee could then convey the land to a third person in fee simple, thus defeating the possible interest of his children as presumptive heirs of his body. The reason was that such heirs were bound to warranty, that is, to uphold the gift or grant of their ancestor, as they could only take the land in question by descent from him, they being entitled to nothing by virtue of the original grant to him, since no estate was given to them, the expression " heirs of his body " or the like being words of limitation limiting and defining the estate conveyed to their ancestor, in whom the entire fee was vested subject to the contingency of their birth. Before the birth of a child the donee had what was in effect a life estate, the fee being subject to the birth of issue as a condition precedent. On the birth of issue, however, the fee vested freed from the contingency, and might be conveyed absolutely as we have seen; but if no conveyance was made so that the donee at the time of his death was still the owner of the estate, it would come to an end unless he was survived by heirs of

his body capable of inheriting in accordance with the terms of the conveyance.¹ These estates were changed into estates in fee tail, as explained in the following section.

§ 85. Origin of Estates in Fee Tail.—The statute *de donis conditionalibus*, or the statute of Westminster II, ch. 1, was enacted during the reign of Edw. I, in the year 1285,² for the purpose of stopping the practice of alienation of the fee so that the overlords might not lose their right of escheat on failure of issue, and so that the issue of the grantor might be protected in their right to the inheritance. This statute provided that such an alienation would not defeat the inheritance of the estate by the heir, and if such conveyance be made the heir might, on the death of his ancestor, recover the property from the person to whom the land had been alienated, or any person claiming through him. If the issue of such tenant should die before the death of the tenant the statute provided that the original donor, or lord, might recover the property as escheating to him, exactly as though no issue had been borne to the tenant. The effect of this statute, as interpreted by the courts, was to create a new species of estate which was called an estate in fee tail. The fee conditional, as we have seen, carried the entire fee, and nothing remained in the grantor except a possibility of escheat in case there should be a failure of issue, and in case no alienation in fee was made by the grantee after the birth of issue, or by any succeeding owner taking in the direct line of descent. But the statute removed the possibility of changing the estate to a fee simple absolute by alienation, and made it over into an estate which by no possibility could continue longer than the direct line of lineal descendants of the tenant. The courts held that this estate was less than a fee simple; that the

1. Bracton, 17; Plowd. 245; 2 Bl. Com. 109-119; Digby Hist. L. R. P. (5th ed.) 222-224.

2. (13 Edw. I, 1285.)

entire fee did not pass from the grantor, but the balance thereof, over and above the estate in fee tail, remained in the grantor as a reversion, necessarily vested in him, since he had never divested himself of it. This interest could be granted over to a third person by way of remainder at the time the state in fee tail was created, as it was the balance of the fee over and above the limited estate in fee tail which had been cut off (*taille*) from the entire fee. Before the statute the possibility of an escheat remaining in the grantor of a conditional fee could not be assigned or granted by way of remainder, as the entire fee had passed to the grantee, or tenant, the mere possibility of escheat not being capable of alienation.³

§ 86. Nature and Kinds of Estates in Fee Tail.— Estates tail general arose in case of a grant or devise “to A and the heirs of his body,” or “to A and the heirs of his body male” or “female.” In the last two cases only male or female heirs of the tenant’s body, as the case might be, could inherit. These estates were called estates tail male and estates tail female respectively. An estate tail special arose where land was granted or devised “to A and the heirs of his body by his present wife, B,” or in any like case where the inheritance was limited to issue by a specified husband or wife of the tenant. In such cases only children born of such wife or husband could inherit, excluding from the inheritance children born of other wives or to other husbands of the tenant.⁴

As we have seen, an estate tail comes to an end, and the land passes to the remainderman or reverts to the reversioner in fee simple, whenever the direct line of descent, as provided for in the deed or will creating the estate, fails. As the tenant in tail could not defeat the right of inheri-

³ Plowd. 251; Lit. §§ 13-24; 2 Bl. (5th ed.) 224-230; Williams R. P. Ccm. 109-119; Digby Hist. L. R. P. (17th ed.) 104-105.

⁴ 2 Bl. Com. 113-116.

tance of his children by any alienation, and could alienate only for his own life, it follows that estates tail effectually prevented the free alienation of lands. This was felt as a great inconvenience and hardship by all except the great landed proprietors for whose benefit the statute *de donis* was originally enacted. No matter how long land might have been held under a title apparently perfect, if an old entail should be discovered, the heirs of the body of the original tenant in tail, though several generations removed, could recover the property under the statute. Titles were thus made uncertain and insecure. Creditors and other claimants against the tenant in tail were unable to enforce their claims against the land, as it would pass to his heir freed from all such claims. The king also suffered, as a tenant in tail did not forfeit his estate for treason so as to defeat the right of his heir. Nevertheless parliament was so controlled by the interests which were benefited by these estates that it was impossible to get relief by legislation.⁵ The barring of entails by means of common recoveries came into general use after "Taltarums Case," (12 Edw. IV). Before that time the principle was recognized that a conveyance by the tenant in tail with warranty bound his heirs by virtue of the warranty provided the tenant in tail died leaving assets, viz., real property of equal value of the estate tail, which passed to his heirs by descent. Where, however, he left no such assets a conveyance made by him or a recovery suffered by him by collusion with a third party suing to recover the land by means of a writ of right would have no effect on the heirs of the tenant in tail, and on his death they could recover the property.⁶ A common recovery, finally worked out as the means of barring an entail in any case whether the tenant left assets or not, took the form of a fictitious and prearranged suit in the form of a writ of

⁵ Digby Hist. L. R. P., 5th Ed., 249, 252, 253; Williams R. P. (17th ed.) 104, 105. ⁶ Digby Hist. L. R. P. (5th ed) 251, 252.

right started by the person to whom the property was to be conveyed in fee simple. He would allege (of course falsely) that he was the owner of the property in fee simple by a title superior to the defendant's, that the defendant had no title to the land, having come into possession of it after the complainant had been wrongfully ousted therefrom by some third person named. The defendant, tenant in tail, would then appear, making no denial of the complainant's allegations, but calling upon one X, alleged to be the man who had conveyed the land to him in tail with warranty, to appear and defend the title which he had warranted. X then would in turn appear and defend the title. X thereafter would default, and thereupon judgment would be given for the complainant against the tenant in tail that he recover the land sued for in fee simple, and because of X's default judgment would be given in the tenant's favor against X that he recover from X lands of equal value in recompense for the lands so conveyed by him with warranty to the tenant in tail. X, called the vouchee, an irresponsible person selected to take this pretended part because judgment-proof, was usually the court crier, and was called the common vouchee because of his employment in this capacity. He, of course, had never any interest in the property, the whole matter being a fiction in so far as his connection with the suit was concerned. The judgment against him for an equal amount of land in favor of the tenant in tail and the heirs of his body was regarded as sufficient recompense for the loss of the entail by such heirs, so that the recovery suffered by the tenant in tail was binding as against them, the complainant taking by virtue of the judgment an estate in fee simple which cut off the entail in favor of the heirs of the body of the tenant in tail and also the reversion of the original grantor of the estate tail or those taking through him, it having been judicially determined that the complainant's title in fee simple was superior to the title of the tenant or of his grantor. Pursuant to the prearranged plan the complainant would then convey the land in fee to

the tenant in tail, who could thereafter hold in fee simple, or convey the property in such other way as such tenant might direct, or pay to the tenant the purchase price agreed upon in case an actual sale to him was intended.⁷

From the time of "Taltarum's Case" (12 Edw. IV), above referred to until 1834, tenants in tail used this method to bar the entail and change their interest to an estate in fee simple. A statute enacted during the reign of Henry VIII permitted the barring of entails by a fine.⁸

§ 87. Fee Tail Estates in Modern Times.—By statute (3 & 4 Will. IV, c. 74), fines and recoveries were abolished in 1834, and thereafter tenants in tail might defeat the entail by conveying the land in fee simple by deed enrolled in the Chancery Division of the High Court of Justice.⁹

Estate tails do not now exist as such in most of the states. In a majority of the states estate tails have been abolished and changed into estates in fee simple.¹⁰ In New York, Michigan, California, and some other states, it is provided in addition that a remainder in fee after an estate tail shall be valid as a conditional limitation to take effect on the death of the first taker of the estate tail without issue. In such case the estate tail is changed into a fee which will become a fee simple absolute if the first taker is survived by issue, but if he dies without issue his estate in fee ends and goes over to the person named as remainderman as a conditional limitation.¹

7. 2 Bl. Com. 357-362; Digby Hist. L. R. P. (5th ed.) 253-255; Williams R. P. (17th ed.) 105-108.

8. 32 Henry VIII, ch. 36.

9. Williams R. P. (17th ed.) 109.

10. N. Y. Real Prop. L. § 32. The first statutory provision to this effect in New York was in 1782 (L. of 1782, ch. 2; L. of 1786, ch. 12). In 1830 the provisions of what is now § 32 of

the Real Property Law were enacted as part of the revised statutes.

Pennsylvania, Indiana, Kentucky, Michigan, Georgia and California are some of the other states which have adopted this provision. Stein. Am. St. L. § 1313; 4 Kent's Com. 14; Kimmel v. Shaffer, 219 Pa. St. 375; Buel v. Southwick, 70 N. Y. 581.

1. See preceding note.

In some states the estate tail is changed into a life estate in the first taker with remainder in fee simple to his child or children.² In other states the remainder in fee after such life estate passes to such persons as would be entitled at common law to take the land on the death of the first taker.³

The Connecticut statute provides that every estate given in fee tail shall be an absolute estate in fee simple, to the issue of the first donee in tail, the estate tail in the donee being changed into an estate in fee simple in the issue of such donee on his death. Ohio has a similar provision.⁴

In Massachusetts, Maine, Rhode Island and a few other states, estates tail may be conveyed as estates in fee simple, and like fee simple estates they are liable for the debts of the tenant and may be sold on execution as estates in fee. In other respects they continue until barred by conveyance as estates tail.⁵ In states where no statute has been enacted or case decided changing or abolishing them it is probable that they would not be recognized or enforced as such but that one or the other of the statutory modifications would be adopted as the common law rule of such states.⁶

D.—Estates for Life.

§ 88. Nature of Life Estates.— Estates for life, including estates *pur autre vie*, are the smallest freehold estates in land which can be created. An estate for life continues dur-

2. N. J. Descent Act, § 11 (1 N. J. Gen. St.) (1895). This statute further provides that the wife of the tenant is entitled to dower, or the husband of the tenant is entitled to curtesy in like manner as if the tenant had died seized of an estate in fee simple. See also *James v. Du Bois*, 16 N. J. L. 285; *In re Dowe*, 68 N. J. Eq. 11.

3. Hurd's Rev. St. Ill. (1899), p. 403, § 6 (Conveyancers Act); *Lehn-*

dorf v. Cope, 122 Ill. 317; *Peterson v. Jackson*, 196 Ill. 40.

4. Conn. Gen. L. § 2952; Ohio Rev. St. § 4200.

5. Mass. Pub. Stat., 1882, c. 120, § 15; 1 Stim. Am. St. L. § 1313 (c); *Collamore v. Collamore*, 158 Mass. 74; *In re Tillinghast*, 25 R. I. 338.

6. Kent. Com. 14. Williams Real Prop. (17th ed.), American notes, p. 121.

ing the life of the life tenant, coming to an end on his death. During his life the life tenant is the exclusive owner of the land so held by him, with the exclusive right to its possession, control and enjoyment. The owner of the reversion or remainder in fee has no present right of enjoyment, no tangible physical ownership of the land. He has a future incorporeal interest or estate in the land which will ripen into ownership of the land itself on the death of the life tenant. Since the life tenant's estate is limited and not absolute, his right of enjoyment is subject to the rule that he shall not commit waste, as we have seen,¹ and of course he can convey only the estate which he has in the land, viz., an estate for his own life. Otherwise his ownership is absolute and without restriction. Since every life estate is necessarily uncertain in duration it follows that the right of emblements attaches as an incident to all life estates. The rules of law applying to waste and emblements are considered elsewhere in this work.² Other incidents attaching to the ownership of life estates as between life tenants and reversioners and remaindermen are considered in detail in a later chapter.³

Under the common law, as we have seen, the word "heirs" was essential in a deed to the creation of an estate in fee. Therefore any conveyance of real property which did not contain the word "heirs" in an operative part of the deed transferred only a life estate in the land, no matter how clearly the intent to convey an estate in fee may have been otherwise expressed. Thus a conveyance "to A and his issue" or "to A and his children forever," was effective only as creating an estate for life, since the word "heirs" was absent. In every such case the terms used were at least sufficient to create an estate for the life of the donee, but not an estate of inheritance under the technical rule referred to.⁴ In wills of real property, after

1. See sections on Waste, *ante*.

3. See Ch. VI., *post*.

2. See sections on Waste and Emblements, *ante*.

4. See § 80, *ante*.

the enactment of the Statute of Wills, the testator's intention was given effect, and if from the terms of the will it appeared that the testator intended to devise an estate in fee, then an estate in fee would pass, though the word "heirs" was absent. This has been fully discussed elsewhere.⁵ The important point to note at this time is that in any case where a deed or will transferring real property failed to pass an estate in fee because of the absence of the word "heirs" in a deed, or of that or some equivalent expression in a will, a life estate passed under the instrument, as the greatest estate which could pass by virtue of the language used.⁶

An estate, not of inheritance, which may continue for the life of the person to whom it may have been granted or devised, is a life estate, though it may be brought to an end by the happening of some collateral event before the death of the tenant. Thus where property is devised to a woman during widowhood a life estate is created, since the estate will continue for her life in case she does not remarry. Such an estate is a life estate upon limitation, subject to be brought to an end by the happening of the event by which it is limited.⁷

An estate for life may sometimes arise by implication from the terms of a deed or will, though the instrument in question contains no limitation of such estate by express words. Thus where a testator devises property to A, and his heirs after the death of B, a life estate arises in B by necessary implication, because if B does not take a life estate A, as heir of the testator, will take the property during the life of B as undisposed of by the will, which is clearly contrary to the expressed intent of the testator that he should not take the property until after B's death. If A

5. See § 82, *ante*.

6. See last two preceding notes, also 2 Bl. Com. 120-121; Jackson v. Newkirk, 14 Johns (N. Y.) 198.

7. 4 Kent Com. 26; Roseboom v.

Van Vechten, 5 Denio (N. Y.) 414;

Hurd v. Cushing, 7 Pick. (Mass.)

169; Warner v. Tanner, 38 Oh. St. 118.

were not the heir of the testator, B would not take a life estate, since the testator might have intended that his heir or heirs should take the property by inheritance until B's death when A's estate would arise.⁸

§ 89. Estates Pur Autre Vie.—An estate *pur autre vie* is an estate in one person limited to continue during the life of another or others. Thus where land is granted or devised to A for the life of B, the estate in A is a life estate which will continue during the life of B and on B's death the estate immediately comes to an end, though A be still alive. If A dies before B a peculiar situation arises under the common law. The land in question could not pass to the heirs of A for the life of B, as his interest is not an estate of inheritance, but only a life estate. It cannot pass to his personal representatives since it is not personal property. The original grantor, or present owner of the reversion or remainder, has no present right to the property until the death of B, since the estate granted to A is not to end, and the reversion or remainder to vest in possession, until the death of B. The conclusion arrived at by the common law courts was that in such event any person who might enter, though an entire stranger, could hold the land until B's death, since there would be no person who could oust him by virtue of a superior title. The rule in such case is that a person in possession of land cannot be ousted therefrom because of the weakness of his own title, but only by virtue of the superior title of the party suing him for the land. In case the estate was given "to A and his heirs for the life of B," the heirs of A were permitted to enter as special occupants ahead of all others.⁹

In England by statute (29 Chas. II, c. 3), it was provided that the interest of the life tenant in such case could be

8. *Fawlkner v. Fawlkner*, 1 Vernon 22 (Eq. Cas. Abr. 119) *Jarman on Wills*, ch. 17, p. 499.

9. 4 Kent Com. 26-28; 2 Bl. Com. 259; *Atkinson v. Baker*, 4 Durn. & East 229.

devised by his will, and if not devised, the heir was made chargeable with it as assets by descent, the heir taking as special occupant. A statute enacted during the reign of George II (14 Geo. II, ch. 20), provided that if the heir was not named as special occupant, and the estate was not devised by the tenant's will, it should pass to the executor or administrator of the tenant as part of his personal estate.¹⁰ In New York the Real Property Law, § 34, provides that an estate *pur auter vie* "shall be deemed a freehold only during the life of the grantee or devisee; after his death it shall be deemed a chattel real." In other words, on the death of the tenant the interest remaining during the life of the third person, whose life measures the estate, passes as personal property to the executor or administrator of the tenant, exactly as a tenancy for a term of years would pass. In Massachusetts, North Carolina and some other states by statute, the interest of the tenant in such case is treated as real property and descends to the heirs of the tenant if not devised by will.¹¹ The New York rule has been followed by statute in Michigan and several other states.¹²

It will be observed that whenever an estate for life is conveyed by the life tenant to another the grantee necessarily takes an estate *pur auter vie*, for the life of the grantor, who as life tenant can convey no greater estate than he has himself, viz.: an estate measured by his own life.

If a tenant for life acquires a life estate held by another in the same land, the estate *pur auter vie*, merges with his own life estate and disappears, so that on his death his interest ceases, unless an intent can be shown on his part to keep the two interests separate and distinct.¹³

10. See last note.

11. Mass. Pub. St. c. 125, § 1; 1 Stim Am. St. L. § 2630.

12. The New York rule prevails by statute in Michigan, Minnesota, Wis-

consin and several other states. 1 Stim Am. St. L. § 1310.

13. Bowle's case, 11 Rep. 83b, Co. Litt. 41b.

CHAPTER IV.

DOWER.

A.—Nature of Dower.

§ 90. **What Dower is; Historical Development.**—Dower is the estate which the law gives a wife in the real property of her husband, and constitutes an estate for the life of the wife in one-third of all the real property of which the husband was seised of an estate of inheritance during coverture. The right to dower which exists in the wife before the death of her husband is called *inchoate*; on the death of the husband and before *admeasurement* it is called *consummate*, and it is then a vested right of action against the heir to have dower set off; when actually set off the estate of dower, an estate for the life of the widow arises, subject to the ordinary incidents of life estates.¹

Dower may be traced back to the beginning of the English law of land. Its origin cannot be determined with any degree of certainty. Whether dower comes from an early Danish custom, as suggested by Blackstone,² or was introduced by the Saxons, which is the view favored by Scribner,³ there seems no doubt but that it existed to some extent and in some form during part of the Saxon period.⁴ It was expressly recognized by the Charter of Henry I, about 1101; and the Great Charter of King John, as modified and amended by the first and second charters of Henry III (1215 to 1217), recognizes and defines the right of dower in very much the same terms in which it is stated and defined to-day.⁵ As these charters were declarations of rights of the people theretofore existing, and as they, in general declare

1. Co. Litt. 30a; 2 Bl. Com. 129, 121; 4 Kent' Com. 35; 3 Bac. Abr. 191.

2. 2 Bl. Com. 129.

3. 1 Scribner Dower, 5.

4. 1 Scribner Dower, 6.

5. 4 Kent Com. 36; Scribner Dower, 13.

existing customary rights or those enjoyed before the conquest, the conclusion is irresistible that dower existed as part of the law, in some form, long before the Norman conquest.⁶

There can be no question that the purpose of the law in creating dower was to provide for the sustenance and support of the wife and children after the death of the husband and father. Dower, therefore, is an estate created by law and arising out of the marital relation, in recognition of the moral obligation on the part of the husband to make provision for his wife after his death, as well as to support and provide for her during his life.⁷

§ 91. **Requisites of Dower.**— Before the inchoate right of dower arises two things must concur: there must be a valid marriage between the parties, and the husband must have been seised, at some time after said marriage and during coverture, of an estate of inheritance in the land in which dower is claimed, capable of being inherited by the children of the marriage. On the death of the husband, this inchoate right of dower becomes consummate; it has become an absolute right in the wife to have one-third of the real estate to which her inchoate right attached set off to her for her life.⁸

B.—Marriage as a Requisite.

§ 92. **Void and Voidable Marriages.**— The martial relation is essential to dower, as it was created by the law as an incident of that relationship. Therefore there must be a valid marriage before dower can arise. If the marriage is absolutely void under the law of the place where solemnized, no right of dower exists.⁹ If the marriage is voidable

6. 1 Scribner Dower, 9-16.

7. 1 Scribner Dower, 20-22; Banks v. Stratton, 2 P. Wms. 702.

8. See sections which follow on marriage and seisin.

9. Besson v. Gribble, 39 N. J. Eq.

111; Jones v. Jones, 28 Ark. 19; Cropsey v. Ogden, 11 N. Y. 228; Smith v. Wentworth, 44 Barb. (N. Y.) 198; Price v. Price, 124 N.Y. 589;

merely, but not void until its invalidity has been determined by a court of competent jurisdiction, the inchoate right of dower exists in lands of which the husband is seised until the marriage is set aside and annulled by judgment or decree; when it is so set aside the right to dower ceases and the wife is treated in so far as dower is concerned, as though no marriage had ever been made.¹⁰

§ 93. Validity; How Determined.—The law of the place where the marriage is made determines its validity, except that marriages which violate the accepted standards of morality generally, such as polygamous and incestuous marriages, are void in most jurisdictions, even though valid at the place where solemnized.¹ Where by the laws of the state a divorced person is prohibited by the terms of the judgment or decree of divorce from marrying again during the life of the plaintiff who secured the divorce, a marriage contracted in violation of such prohibition in the same state is void;² but if it is contracted in another state, by the law of which such marriage is legal, it is recognized as valid in the state in which the decree of divorce was made, even

Smith v. Smith, 5 Ohio St. 32; Higgins v. Breen, 9 Mo. 493, 497; Ward v. Bailey, 118 N. C. 55; Putnam v. Putnam, 8 Pick. (Mass.) 433.

10. Cage v. Acton, 1 Ld. Raym. 521; Price v. Price, 124 N. Y. 589; Wiser v. Lockwood, 42 Vt. 720; Bonham v. Badgley, 7 Ill. 622; Adkins v. Holmes, 2 Ind. 197, and cases discussed in § 93 and cited thereunder.

See also Ward v. Bailey, 118 N. C. 55, the court holding that the marriage was void, but recognizing the rule that if the marriage had been voidable the wife would be entitled to dower unless the marriage was annulled during the life of the husband.

1. Van Voorhis v. Brontnall, 86 N.

Y. 18; Medway v. Needham, 16 Mass. 157; Putnam v. Putnam, 25 Mass. 433; Hutchins v. Kimmell, 31 Mich. 126; State v. Ross, 76 N. C. 242 (holding that marriage between a negro and a white person, void if contracted in North Carolina, is valid in North Carolina when contracted in another state where such marriage is valid).

2. Cropsey v. Ogden, 11 N. Y. 228, Smith v. Wentworth, 44 Barb. 198 (holding that the rule is the same and the statute applies where the marriage and divorce thereafter were in another state, the subsequent marriage of the defendant in this state is void).

though the parties were married in a neighboring state with the express purpose of avoiding the prohibition of the decree.³

Therefore, where the question of validity arises, it can be determined only by examining the statutory provisions relating to marriage which will be found in all the states. Incestuous and bigamous marriages are, as we have seen, absolutely void in all the states.⁴ The statutes in several states provide that if a husband or wife has been absent for a period designated, generally for either five or seven years, and has not been heard from and his absence remains unexplained, is presumed to be dead, and a marriage contracted by the other thereafter in good faith after making every reasonable effort to find the absent party, is voidable merely and not void until annulled by a court of competent jurisdiction, though it appear later that the absent spouse was living at the time of the subsequent marriage.⁵

3. *Von Voorhis v. Brontnall*, 86 N. Y. 18; *Medway v. Needham*, 16 Mass. 157; *Putnam v. Putnam*, 25 Mass. 433. In *Cunningham v. Cunningham*, 206 N. Y. 341, holding that a marriage contracted by a girl under 18 was voidable in N. Y., though valid in N. J., where contracted, the parties being residents of N. Y., states the reason why the marriage of a divorced person outside of the state who is forbidden to marry again by decree against him in N. Y. is because such prohibition is in the nature of a penalty not enforceable outside N. Y.

4. See cases cited in note 9 under § 92, *ante*, and the statutes of the several states. The N. Y. Dom. Rel. Law (Ch. 14 Consolidated Laws) § 5, provides that a marriage is incestuous and void when between an ancestor or descendant, a brother and sister of the whole or half blood, an uncle and niece or an aunt and nephew.

§ 6 provides that a marriage contracted by a person whose husband or wife by a former marriage is living is void (1) unless the former marriage has been annulled or dissolved for a cause other than the adultery of the person remarrying; (2) unless the former husband or wife has been finally sentenced to imprisonment for life; (3) unless the former husband or wife has been absent for five successive years prior to the second marriage without being known to such person to be living.

5. *Cropsey v. McKinney*, 30 Barb. (N. Y.) 47; *Price v. Price*, 124 N. Y. 589; *In re Harrington*, 140 Cal. 294; *Hiram v. Pierce*, 45 Me. 367; *Strode v. Strode*, 3 Bush (Ky.) 227.

The N. Y. Dom. Rel. Law (Ch. 14. Consol. Laws, § 7) provides that a marriage is void from the time its nullity is declared by a court of competent jurisdiction if either party

Two situations may arise: 1st, remarriage of the husband after the unexplained absence of his wife for the statutory period, and 2nd, remarriage of the wife after similar absence on the part of the husband. In either case, since the second marriage is voidable and not void, the wife of the second marriage should be entitled to dower if her husband dies before the marriage is annulled.⁶ In the first case

thereto (1) is under the age of legal consent, which is eighteen years; (2) is incapable of consenting to a marriage for want of understanding; (3) is incapable of entering into the marriage state from physical cause, (4) consents to such marriage by reason of force, duress or fraud; (5) has a former husband or wife living who has been absent for five successive years then last past without being known to such party to be living during such time.

In the absence of such statutory provision in other states such marriages are absolutely void. *Glass v. Glass*, 114 Mass. 563; *Thomas v. Thomas*, 124 Pa. St. 646; *Pain v. Pain*, 37 Mo. App. 110.

6. *Price v. Price*, 124 N. Y. 589 (holding that when the second marriage has been annulled the right of dower of the second wife comes to an end, and by implication recognizing the right of dower as existing if the second marriage had not been annulled), *Cropsey v. McKinney*, 30 Barb. (N. Y.) 47 (holding that such a marriage was valid, not having been set aside, and its validity could not be questioned after the death of either party, so that a transfer of the wife's personal property by the husband was valid, this being before the married woman's property statutes were enacted); *White v. Lowe*, 1 Redf. (N.

Y.) 376 (holding that the survivor was entitled to administration); *Jones v. Zoller*, 29 Hun (N. Y.) 551; 32 id. 280; 37 id. 227; reversed on another point. 104 N. Y. 418, the Court of Appeals refusing to pass on this question.

In *Gall v. Gall*, 114 N. Y. 109, and *Stokes v. Stokes*, 198 N. Y. 301, the court holds that the party remarrying must make reasonable inquiries, and must honestly believe, acting as a reasonable person, that the former spouse is dead. The enquiries and efforts to find the absent party must be thorough—such as the importance of the matter deserves and requires.

In the *Gall* case, following a similar statement in *Griffin v. Banks*, 24 How. Pr. 213, the court held that giving validity to the second marriage in such case necessarily suspended the first marriage. Otherwise the law would sanction a polygamous relation. As soon as the second marriage is avoided the first marriage is fully restored. Though this is sound as to the personal relation between the first husband and wife, it is submitted that the validity of the second marriage can have no effect on the right of dower of the first wife. In *Re Harrington*, 140 Cal. 294, holds, however, that the second marriage of the wife in such case deprives her of marital property rights under the first marriage.

above stated both wives should be entitled to dower, the dower of the second wife being subject to the dower of the first. The right of the first wife to dower is undoubted since the validity of her marriage is not affected by the subsequent marriage; at most the personal relation under the first marriage is suspended until the second marriage is annulled; it remains valid in every other respect, and it is submitted that property rights arising thereunder are not affected by such suspension. In the second case, if the two husbands should die, the second marriage not having been annulled, the wife would be entitled to dower in the real property of which each husband was seised during his coverture. She has dower in her first husband's property, the first marriage being valid in every respect; and her right to dower in the second husband's property is undoubted, since the marriage was not annulled, and therefore continued to be valid till his death.⁷ There seems to be little authority on these questions, which remain unsettled.

In the majority of the states there is no such statutory provision, and the second marriage, contracted in any case during the life of a former husband or wife, is absolutely void, and no right of dower arises thereunder. Another general provision is that marriages contracted by parties under the age of legal consent are voidable. Under the general rule such marriages are valid till set aside, and unless set aside before the death of the husband, the wife will be entitled to dower.⁸

7. See preceding note. See, also, cases cited in note 10, preceding, sustaining the undoubted rule that a voidable marriage gives dower unless avoided during the lives of the parties. It follows necessarily, in the cases discussed in the text, since the marriages were voidable and were never set aside, that dower attaches as stated in the text. The question,

however, seems never to have been definitely determined by the cases.

8. Co. Litt. 33a; 1 Scribner Dower, 135-139; 3 Dyer, 368b; see § 5. N. Y. Dom. Rel. L. (Ch. 14, Consolidated Laws), note 4 preceding.

See *State v. Lowell*, 78 Minn. 166; *State v. Cone*, 86 Wis. 498, holding that such marriages are voidable and not void. It follows, of course, that

The setting aside of voidable marriages results in making them void from the beginning in every respect and for every purpose, except as provided by statute. Under the common law the decree of annulment rendered the children of such marriages illegitimate, and the relation of the parties meretricious. By the modern statutes the children of such marriages are legitimate and the relation between the parties up to the making of the decree of annulment, is lawful, in spite of the decree.⁹ There is no provision in the statutes, however, which preserves the wife's right of dower after such annulment, and therefore dower must end with the termination of the marital relation out of which it grew and on which it depends.¹⁰

§ 94. What Constitutes a Valid Marriage.—In most jurisdictions the statutes thereof provide for the ways in which marriages may be solemnized, and the officers or clergymen who may officiate.¹ Where, by the terms of such statutes it is provided that no marriage is valid unless made in accordance with the statutory provisions, the common law marriage is not recognized as valid, but in the absence of such provision common law marriages have been

dower attaches subject to be defeated by annulment.

9. See note 5 preceding.

10. Price v. Price, 124 N. Y. 589.

1. See the statutes of the different states for provisions as to solemnization of marriage.

As to how a marriage must be solemnized in N. Y., see §§ 11 and 12 of the Domestic Rel. Law (Ch. 14, Consolidated Laws), providing for marriages by clergymen and by certain city and judicial officials, and also by written contract signed by both parties, and subscribed by two witnesses, and acknowledged by the parties and witnesses as a deed to be recorded.

See, also, §§ 13 to 20, as to duties of clergymen or magistrates, securing of license and filing of certificate or contract.

§ 19 of the Dom. Rel. Law, added by L. of 1901, ch. 339 (incorporated in § 11 of said law as modified in 1909, when included as Ch. 14 of the Consolidated Laws), provides that no marriages contracted in New York after Jan. 1st, 1902, shall be valid unless contracted in accordance with the express provisions of the Domestic Relations Law. Prior to this enactment common law marriages were fully recognized in New York. Gall v. Gall, 114 N. Y. 109.

recognized as valid in most of the states.² The common law marriage is one made without ceremony or officiating clergyman or officer, by the actual agreement of the parties to assume the relationship of husband and wife, and it may be established either by direct evidence of such agreement, or by indirect evidence, as that the parties have cohabited together as husband and wife, and have been generally known as such, and such other evidence of like character as will tend to establish the making of such contract between them.³

C.—Seisin of the Husband.

§ 95. What Constitutes Seisin.—Before the inchoate right of dower attaches the husband must be seised of an estate of inheritance in the land in question, which the issue of the marriage, if any, could inherit.¹ Seisin means

2. 1 Scribner Dower, 71 to 98, containing a review of the cases in the different states. McKenna v. McKenna, 180 Ill. 577; Peet v. Peet, 52 Mich. 464; State v. Worthingham, 23 Minn. 528; Blanchard v. Lambert, 43 Iowa 228; Dyer v. Brannock, 66 Mo. 391.

In Northfield v. Plymouth, 20 Vt. 582, the court held that to recognize the common law marriage would be in effect to abrogate the Vermont statutes.

3. Jones v. Jones, 28 Ark. 19; Fenton v. Reed, 4 Johns. (N. Y.) 52; Jackson v. Ciaw, 18 Johns. (N. Y.) 346; Besson v. Gribble, 39 N. J. Eq. 111; Pearson v. Honey, 11 N. J. L. 13; Thorndell v. Morrison, 25 Pa. St. 326; Greenawalt v. McEnelley, 85 Pa. St. 352; Williams v. Williams, 46 Wis. 46; Carter v. Parker, 28 Me. 509; Boone v. Purnell, 28 Md. 607; Young v. Foster, 14 N. H. 141; Stevens v. Reed, 37 N. H. 49.

Where cohabitation is illicit at the start, the inference is that it so continues thereafter, in the absence of strong evidence of a marriage. Northfield v. Plymouth, 20 Vt. 582; Williams v. Williams, 46 Wis. 460; Gall v. Gall, 114 N. Y. 109.

1. Co. Litt. 31a; Durando v. Durando, 23 N. Y. 331; House v. Jackson, 50 N. Y. 161; Mann v. Edson, 39 Me. 25; Pritts v. Ritchie, 29 Pa. St. 71; Dudley v. Dudley, 76 Wis. 567; Wheeler v. Smith, 50 Mich. 93; Kirkpatrick v. Kirkpatrick, 197 Ill. 144; Smallridge v. Haziatt, 112 Ky. 841; Burgoon v. Whitney, 121 Iowa 76, and cases cited in notes which follow.

That the estate must be one inheritable by possible issue of the marriage, see Litt. § 53; 2 Bl. Com. 131; Amcotts v. Catherich, Cro. Jac. 615; Barker v. Barker, 2 Simons 249 (curtesy).

possession of the land by one having a freehold estate therein. An estate which under the common law before the Statute of Uses required the ceremony of livery of seisin in its creation, is a freehold estate, carrying with it the feudal incidents of tenure, as distinguished from a term of years which did not require livery of seisin, and which involved no feudal relation with the overlord. A tenant for years, therefore, is never seised, since he has no freehold estate. Livery of seisin was not made to him in the creation of his term. His possession is the possession of his landlord, holding for life or in fee, who is therefore seised of the freehold.²

It follows that if the husband is the owner of a remainder or a reversion, to take effect in possession after the expiration of a present life estate, his wife will not be entitled to dower in the property in question if the husband dies during the life of the life tenant. The seisin is in the life tenant, since he is in possession with a present freehold estate in the land, and therefore the owner of the estate in reversion or remainder is not seised, not being in possession or entitled to the possession.³ But if the precedent estate be only a term of years, as the tenant for years cannot be seised, and as his possession is that of his landlord, the reversioner or remainderman as the case may be, seisin is in such remainderman or reversioner, and the right

2. See § 75, *ante*.

3. *Durando v. Durando*, 23 N. Y. 331; *Otis v. Parsley*, 10 N. H. 403; *Blood v. Blood*, 40 Mass. 80; *Sammis v. Sammis*, 23 R. I. 499; *Kirkpatrick v. Kirkpatrick*, 197 Ill. 144; *Carter v. McDaniel*, 94 Ky. 564; *Durham v. Angier*, 20 Me. 242; *Von Arb v. Thomas*, 163 Mo. 33; *Dudley v. Dudley*, 76 Wis. 567; *Houston v. Smith*, 88 N. C. 312.

If the precedent life estate is conveyed to the husband, so that it merges with the remainder, he is then

seized of an estate of inheritance and dower attaches. *House v. Jackson*, 50 N. Y. 161; *Strawn v. Strawn*, 50 Ill. 33.

In Pennsylvania under a statute providing that in case of intestacy the wife shall have a life estate in one-half the real property of decedent and one-half of his personal property absolutely, it is held that the wife takes a half interest in remainders belonging to the husband, though he was never seized of the property. *Cote's Appeal*, 79 Pa. St. 235.

of dower of his wife attaches to the land, subject only to the term of years.⁴

Suppose A dies intestate, leaving a widow, B and a son, C. The son marries X and dies during the life of his mother. In such case C, the son, inherits the real property of A, but subject to his mother's right of dower, which is the right to have one-third of the property set off to her for life. If C dies during the life of his mother X, his wife will be entitled to dower in only two-thirds of the property in question, because no matter how long after the death of A dower is set off to his widow, her seisin is held to relate back to the time of A's death, so that C, dying during his mother's life, was never seised of her one-third, and therefore his wife's dower is limited to the remaining two-thirds of the property.⁵ But if C's mother dies, her dower never having been set off, his wife will be entitled to dower in the entire estate.⁶

§ 96. Seisin in Fact and at Law.—Seisin in fact includes all cases where the husband has actually taken possession, having a freehold estate of inheritance, and also all cases where he takes title by the modern deed, or by deed under the Statute of Uses, since the delivery of the deed results in putting seisin in the grantee as completely as would the common law livery of seisin, such deeds having taken the place of the common law feoffment with livery of seisin

4. *Sheaf v. Carr*, 24 Beav. 259; *Weir v. Tate*, 39 N. C. 264; *Boyd v. Hunter*, 44 Ala. 703; *Sykes v. Sykes*, 49 Miss. 190.

Dower in Lands Exchanged. Where lands are exchanged the wife of either party to the exchange is entitled to dower in either parcel, since her husband was seized of both, but she is not entitled to dower in both parcels. *Co. Litt.* 31b; *Cass v. Thompson*, 1 N. H. 65. In New York, § 191, R. P.

Law, provides further the wife must elect by entry or action within a year for dower in the land conveyed by her husband in exchange; otherwise she is deemed to have elected to take dower in the lands received in exchange.

5. *Matter of Cregier*, 1 Barb. Ch. (N. Y.) 598; *Dunham v. Osborn*, 1 Paige (N. Y.) 634.

6. *Null v. Howell*, 111 Mo. 273, and preceding note.

as the method of transferring title to real estate *inter vivos*.⁷ Where the husband inherits property as heir, and where property is devised to him by will, he is not seised in fact before entry;⁸ but if the premises are in the possession of a tenant for years at the time, holding under a lease not yet expired, in which case the possession of the tenant is his possession, he is seised as a matter of fact.⁹ Where there is no such possession by a tenant, the husband is said to be seised in law, which means only this: that he will not be permitted to defeat his wife's dower by failing to make an entry; if he is entitled to the immediate possession he is sufficiently seised to entitle his wife to dower whether he enters or not.¹⁰

7. *Adair v. Lott*, 3 Hill (N. Y.) 182; *Jackson v. Johnson*, 5 Cowen 74; *Carr v. Anderson*, 6 App. Div. (N. Y.) 6; *Borland v. Marshall*, 2 Ohio St. 308. The foregoing are all cases involving the question of actual seisin in the wife as a requisite of curtesy. They, however, necessarily stand for the proposition of the text, since the same principle is involved in cases of actual seisin of the husband. See, also, *Atwood v. Atwood*, 39 Mass. 283.

8. See preceding note.

9. *De Grey v. Richardson*, 3 Atk. 469, and cases cited in note 7, *supra*.

10. 4 Kent Com. 37; *Durando v. Durando*, 23 N. Y. 331; *Mann v. Edson*, 39 Me. 25, and cases in note 7, *supra*.

When property is held adversely to the husband during the entire period of coverture, so that the husband was never seised, there is no seisin either in fact or at law which would entitle his wife to dower. 4 Dana Abr. 669; 1 Washb. R. P., § 390. The right of the husband to maintain ejectment is a right of action, not amounting to seisin at law. 1 Scribner 255. There-

fore a right to enter for breach of condition does not give dower. *Thompson v. Thompson*, 46 N. C. 430; *Ellis v. Kyger*, 90 Mo. 600. In Ohio the court held that in the like case of curtesy adverse possession was immaterial, since the technical doctrine of seisin has no application to present conditions; that therefore curtesy attaches if the wife is owner of the property, even though she was never seised. *Borland v. Marshall*, 2 Ohio St. 308. In Missouri it is held, under a statute, that the widow is entitled to dower though there was no actual possession or recovery of possession by the husband during his life. *Bartlett v. Tinsley*, 175 Mo. 319.

Where the husband becomes seised, and is disseised during coverture by one holding adversely, the adverse holding during the coverture does not affect the wife's right of dower, since she could maintain no action against the disseisor during her husband's life. *Durham v. Angier*, 20 Me. 242.

In England and in some of the states, there are statutes giving the wife dower in lands as to which her

§ 97. **Dower in Mortgaged Property.**—Originally under the common law theory of mortgages, by which mortgages were treated as conditional conveyances subject to be defeated by payment of the mortgage debt on the due day, the mortgagee was held to be seised, not the mortgagor. Therefore where the husband became the owner of property subject to a mortgage, he was held to have only a right in equity to redeem the property from the lien of the mortgage, but no legal seisin, and for that reason his wife was not entitled to dower.¹ Even in equity the wife fared no better, for though equity treated the mortgage as a conveyance by way of security, and regarded the mortgagor as beneficial owner subject to the lien of the mortgage, equity refused to recognize dower as an incident of equitable estates, and therefore refused to give to the wife dower in her husband's equity of redemption.²

Under the modern cases mortgages are regarded in some states as conveyances of the bare legal title to the mortgagee, solely for the purpose of securing the mortgage debt, and the mortgagor in possession is seised of the property as owner against all persons except the mortgagee. His interest, though strictly speaking, an equitable interest only, since the technical legal title is in the mortgagee, and though generally termed the "equity of redemption," is nevertheless regarded as legal ownership as against anyone not claiming under the mortgage, and therefore his wife is entitled to dower in the property acquired by him subject to a mortgage, as against everyone but those claiming under the mortgage; in other words her dower attaches subject to the mortgage. In many states mortgages are mere liens,

husband had only a right of action or entry. 3 and 4 Wm. IV, c. 105, § 3; 1 Stimson Am. St. L. § 3211; Stat. Ky. (1903), § 2134; Va. Code, § 2268.

1. *Burgess v. Wheate*, 1 Black. Rep. 160; *Dixon v. Saville*, 1 Bro. 326; *Collin's Widow v. Torrey*, 7 Johns. (N.

Y.) 278; *Culver v. Harper*, 27 Ohio St. 464; *Grant v. Stanley*, 37 Me. 11; *Burnet v. Burnet*, 46 N. J. Eq. 144.

2. *Park Dower*, 137; Cases in preceding note. Also *Stelle v. Carroll*, 12 Pet. (U. S.) 201; *Mayburry v. Brien*, 15 Pet. (U. S.) 38.

the legal title remaining in the mortgagor throughout, the mortgagee having a lien only to secure the mortgage debt. It follows that in these states also the wife is entitled to dower in the property, subject only to the mortgage and rights arising thereunder.³ It will further appear from the cases cited that the same situation exists where the wife bars her dower by joining with her husband in a mortgage. Under the common law her dower was gone absolutely, unless the mortgage was satisfied, since she had barred her dower by a conveyance of the legal title; but by the modern view her dower attaches to the property subject to the mortgage. Of course the wife's inchoate right of dower attaches to her husband's interest in the property subject to all liens which encumber his estate at the time her right of dower attaches, viz.: on the concurrence of marriage and seisin.⁴ The wife of the mortgagee is not entitled to dower, since her husband has, at most, the bare legal title held by way of security and is not beneficially seised.⁵

3. Collin's Widow v. Torrey, 7 Johns. (N. Y.) 278; Mills v. Van Voorhies, 20 N. Y. 412; Fish v. Fish, 1 Conn. 559; Burnet v. Burnet, 46 N. J. Eq. 144; Wade v. Miller, 32 N. J. L. 296; Thompson v. Boyd, 22 N. J. L. 543; Newton v. Cook, 4 Gray (Mass.) 46; Snow v. Stevens, 15 Mass. 279; Simonton v. Gray, 34 Me. 50; Cox v. Garst, 105 Ill. 342; Culver v. Harper, 27 Ohio St. 464; Daniel v. Leitch, 13 Grat. (Va.) 195; Snyder v. Snyder, 6 Mich. 47; Hastings v. Stevens, 29 N. H. 564; Eddy v. Moulton, 13 R. I. 105.

In many states statutes provide that the widow of the mortgagor shall be endowed of the property against every one except the mortgagee or those claiming under the mortgage. N. Y. Real Prop. Law, § 192; 1 Stimson Am. St. L., §§ 3214, 3216.

In states where there are separate courts of law and equity, if the mort-

gagee, or any one claiming under the mortgage becomes the owner of the husband's equity of redemption, before his death, the wife has no right to dower at law; but she has a right in equity to redeem *pro tanto*, and then take dower in the property redeemed. Cox v. Garst, 105 Ill. 342; Thompson v. Boyd, 22 N. J. L. 543; Woodhull v. Reid, 16 N. J. L. 128.

In Rands v. Kendall, 15 Ohio 671, in a case where the husband released the equity of redemption to the mortgagee, the court held that the widow had no dower in the equity of redemption as it was only an equitable estate, and the husband was not seized of it at his death.

4. See preceding note.

5. 4 Kent Com. 43; Cooper v. Whitney, 3 Hill (N. Y.) 95, 100; Reed v. Shepley, 6 Vt. 602; Foster v. Dwine, 49 Me. 44.

§ 98. **Purchase Money Mortgages.**—When a married man takes title to real property and gives back to the vendee a mortgage to secure the whole or any part of the purchase money, pursuant to a contract of purchase and as part of the same transaction, his wife's dower attaches to the property subject to the purchase money mortgage, and therefore it is unnecessary for wives to join in such mortgages in order to bar their dower.⁶ The reason for this is that the husband buys only the equity of redemption in the property, subject always to the mortgage which he agrees to give back, and his wife's dower right can attach only to his interest. The reason commonly given for this rule is that the husband's seisin is instantaneous, the seisin passing immediately to the mortgagee through the delivery of the mortgage immediately after the delivery of the deed to the husband, and that such seisin is not beneficial, but solely for the purpose of passing on the title to the mortgagee.⁷ However logical and correct this may have been under the ancient common law doctrine of dower in mortgaged property, as explained in the preceding section, it does not apply to the situation existing under the modern cases which give the wife of the mortgagor dower in mortgaged property subject to the mortgage. It is a quite sufficient reason for the rule that the husband contracts for and gets the property subject to the purchase money mortgage, his interest being commonly called the equity of redemption, and the wife's dower right can attach only to such interest. That this artificial doctrine of instantaneous seisin no longer applies and is therefore misleading is clearly shown in those cases where some considerable time elapses between the delivery of the deed to the husband and the

6. Co. Litt. 31a; 2 Bl. Com. 132; Hinds v. Ballou, 44 N. H. 619; Welch Boorum v. Tucker, 51 N. J. Eq. 135; v. Buckins, 9 Ohio St. 331; Reed v. Mills v. Van Voorhies, 20 N. Y. 412; Morrison, 12 Serg. & R. (Pa.) 18, and Smith v. McCarthy, 119 Mass. 519; cases in following notes. Moore v. Rawlins, 45 Me. 493; Nottingham v. Calvert, 1 Ind. 527;

7. See preceding note.

delivery of the purchase money mortgage by him. In such cases his seisin is certainly not instantaneous; it may continue for months; nevertheless his wife's dower is subject to the mortgage given later to secure the purchase money.⁸ In such case, during the interval referred to, the husband is either bound by his contract of purchase to give the mortgage, or his title is subject to the vendor's lien, viz.: a lien on the land which equity gives vendors of real property for the unpaid balance of the purchase money. The dower right is subject, of course, to the contractual obligation of the husband or the vendor's lien, as the case may be, and will remain subject to the purchase money mortgage given pursuant to the contract, or given to take the place of the vendor's lien. In other words her dower attaches to her husband's actual interest in the property.⁹

8. *Boorum v. Tucker*, 51 N. J. Eq. 135; *Wheatley v. Calhon*, 12 Leigh (Va.) 264.

In *Rawlins v. Lowndes*, 34 Md. 639, the court held that dower was superior to a mortgage given to secure purchase money several days after delivery of the deed to the husband. This decision rested on the finding of the court that there was no evidence that the mortgage had been agreed upon under the contract of sale. If there had been such agreement to give the mortgage it would seem very clear that the widow's dower should be held subject thereto.

It must appear affirmatively that the mortgage was given to secure purchase money. *Grant v. Dodge*, 43 Me. 489; *Smith v. McCarty*, 119 Mass. 519.

9. See preceding note.

The doctrine of instantaneous seisin is responsible for statements in most of the cases that the purchase money mortgage must be delivered at

the same time that the deed is delivered, as a part of the same transaction. See cases in note 6, *supra*. But it is clear that it is not the instantaneous character of the seisin which prevents dower from attaching. If the seisin carries with it beneficial ownership of the property, dower attaches, no matter how brief the seisin may be. *Stanwood v. Dunning*, 14 Me. 290; *Holbrook v. Finney*, 4 Mass. 566; *Griggs v. Smith*, 12 N. J. L. 22; *Sutherland v. Sutherland*, 69 Ill. 481; *Broughton v. Randall*. Cro. Eliz. 502. In this last case a father and son had been hanged together, and the son appeared to live a moment longer than the father. They owned property as joint tenants, and it was held that the son was seized sufficiently to give dower to his wife. Therefore, the true reason why a husband, giving a purchase money mortgage, was not sufficiently seized was because, at common law, his seisin was not bene-

Where the purchase money in whole or in part is advanced by a third party, a mortgage given to such third party is a purchase money mortgage and the dower of the wife of the purchaser is subject thereto. By the transaction of purchase the husband became owner of the equity of redemption only, and his wife's dower right is limited, here as in all cases, to the actual interest which he acquired.¹⁰

In every case where the wife's dower right is subject to a mortgage, whether a mortgage made before dower attached, or a purchase money mortgage, or a mortgage in which the wife has joined with her husband, she is entitled to dower in the equity of redemption, and may redeem the property from the mortgage in order to protect her dower.¹¹ On foreclosure of the mortgage her dower right is transferred to the surplus money payable to her husband after satisfying the mortgage debt, and if she makes application therefor, the court will protect her interest by ordering the

ficial, but solely for the purpose of transferring title, by purchase money mortgage, to the vendor. Under the modern law, which regards the mortgagor as the owner of the property, subject to the lien of the mortgage, the husband is beneficially seized, and in nearly all jurisdictions it is now admitted that the wife is entitled to dower as against every one other than the mortgagee, and that she has dower in the equity of redemption. There is no reason, therefore, why a purchase money mortgage given after the delivery of the deed, either pursuant to the contract of sale, or in the absence thereof in substitution for the vendor's lien, should not be superior to the wife's dower right.

That the vendor's lien is superior to dower of the purchaser's wife, is recognized in most jurisdictions. 1 Seribner, 555; Boorum v. Tucker, 51 N. J. Eq. 135; Warner v. Van Al-

styne, 3 Paige (N. Y.) 513; Shirley v. Sugar R. Co., 2 Edw. Ch. (N. Y.) 505; Unger v. Leiter, 32 Ohio St. 210; Hugunin v. Cochrane, 51 Ill. 302; Cocke v. Bailey, 42 Miss. 81; Roush v. Miller, 39 W. Va. 638.

The dower right of the wife being subject to the vendor's lien, there seems to be no valid reason why a purchase money mortgage taking the place of such lien, some time after the conveyance to the husband, should not also be superior to her right of dower.

10. Kittle v. Van Dyck, 1 Sandf. Ch. (N. Y.) 76; Adams v. Hill, 29 N. H. 202; King v. Stetson, 11 Allen 407; Glenn v. Clark, 53 Md. 580; Cowardin v. Anderson, 78 Va. 88; Roush v. Miller, 39 W. Va. 638. See also Thomas v. Hanson, 44 Iowa 651.

11. See cases cited in last four preceding notes.

investment of one-third of such surplus money to await the event of her surviving her husband, the income therefrom being payable to the husband while he lives, and after his death the income will be paid to the wife, or if the parties all agree to it, the present value of her dower may be determined and paid to her at once.¹²

D.—Estates to which Dower Attaches.

§ 99. **Dower in Equitable Estates.**—It appears sufficiently from the foregoing sections that dower attaches to all legal estates of inheritance. Certain special classes of estates require further consideration in so far as the nature of the estate affects the right of dower.

An equitable estate is a trust, the legal title to the property being in a trustee for the benefit of the *cestui que trust*, as the owner of the trust estate is called. Such estates did not exist from the standpoint of courts of law, but were recognized only in equity. Therefore courts of equity have sole jurisdiction over such estates, and the sole power of determining the incidents attaching thereto, including dower and curtesy. The general principle in accordance with which the character and incidents of these estates were worked out was this: that equity follows the law, applying to these estates all the incidents which attach to legal estates of the same kind, in so far as those incidents may be applied without violating the trust.¹ The most important

12. *Mills v. Van Voorhies*, 20 N. Y. 412; *Elmendorf v. Lockwood*, 4 Lans. (N. Y.) 393; *Vartie v. Underwood*, 18 Barb. (N. Y.) 561; *Citizens Sav. Bank v. Mooney*, 26 Misc. (N. Y.) 67 (holding that she may demand that one-third be invested, &c. She has no right to demand payment of a sum in gross); *Emmigrant, &c. Bank v. Regan*, 41 App. Div. (N. Y.) 523; *De Wolf v. Murphy*, 11 R. I. 630; *Strayer v. Long*, 86 Va. 557; *Schmidt v.*

Willis, 40 N. J. Eq. 515; *Schweitzer v. Wagner*, 94 Ky. 458; *George v. Cooper*, 15 W. Va. 666; *Fox v. Pratt*, 27 Ohio St. 512; *Thompson v. Lyman*, 28 Wis. 266; *contra*, *Kauffman v. Peacock*, 115 Ill. 212; but see *Virgin v. Virgin*, 189 Ill. 144; *Newhall v. Lynn Sav. Bank*, 101 Mass. 428, holding that wife is barred from dower in surplus money, she not having exercised her right to redeem.

1. See Ch. VIII., *post*.

exception to this rule was in the case of dower; though equity followed the law in determining the devolution of the estate on the death of the *cestui que trust* in fee, and gave curtesy to the husband of such *cestui que trust*, equity refused to follow the law in the case of dower, holding that dower did not attach to equitable estates.² This has been changed by statute in England, where now dower attaches to equitable estates of inheritance of which the husband was seised at his death.³ The inchoate right of dower does not exist in such estates; the right arising only on the death of the husband, he being still the owner of the equitable or trust estate at the time of his death.

§ 100. **Dower in Trust Estates in the United States.**—It is now generally settled in the United States, either by express statutory provision following the English statute, or by decision, or by a combination of statutory provisions and judicial decisions, as in New York, that dower attaches to trust estates in fee of which the husband continues to be the owner at the time of his death. Of course there is no such thing as seisin in the owner of a trust estate, the seisin being in the trustee; but ownership of the equitable estate, carrying with it the present right of enjoyment, is the equivalent of seisin in the case of legal estates, and must concur with a valid marriage and death of the husband who is still the owner of the trust estate, in order that dower may attach.⁴

2. 4 Kent. Com. 43; Bottomley v. Fairfax, Finch Prec. 336; D'Arcy v. Blake, 2 Scholes & L. 388.

3. 3 & 4 William IV, ch. 105. It will be noted that by this statute the husband may defeat the wife's dower by any conveyance or devise in any estate, legal or equitable, so that in England dower attaches only when the husband dies intestate as to the property in question.

4. Hawley v. James, 5 Paige (N.Y.) 418, 452; Hicks v. Stebbins, 3 Lans. (N. Y.) 39; Williams v. Kinney, 43 Hun (N. Y.) 1; Yeo v. Mercereau, 18 N. J. L. 387; Owen v. Robbins, 19 Ill. 545; Tink v. Walker, 148 Ill. 234; Reed v. Whitney, 7 Gray (Mass.) 533; Towle v. Berry, 44 N. H. 569; Abbott v. Bosworth, 36 Ohio St. 605; Pritts v. Ritchie, 29 Pa. St. 71; Junks v. Cannon, 34 Pa. St. 286;

This rule applies to all trust estates in fee, including implied or resulting trusts, or trusts which equity declares shall result from certain acts, though no express trust was created or was intended by the parties involved. Thus where A makes a contract to sell real property to B, and B promises to pay a certain sum therefor, from the standpoint of a court of equity A holds the legal title in trust for B, the purchaser, who is the beneficial owner, subject to the payment of the purchase price according to the contract of sale. If B dies before the transfer of the title to him, not having assigned his contract to another, his widow is entitled to dower in the trust estate which he had under the contract, subject, of course, to the payment of the purchase price.⁵

Langworthy v. Heeb, 46 Iowa 64; *Smallridge v. Hazlett*, 112 Ky. 841; *Foster v. Gordon*, 49 Me. 54; *Glenn v. Clark*, 53 Md. 580; *McRae v. McRae*, 78 Md. 270. For statute see 1 Stim. Am. St. L. § 3212. In *Davis v. Green*, 102 Mo. 170, it was held that the wife's dower in her husband's equitable estate was not affected by the sale under execution of the husband's interest.

In Pennsylvania dower in equitable estates is recognized without the aid of statutes, as part of the law of the state. *Shoemaker v. Walker*, 2 Serg. & R. 554.

Under the statute in Connecticut dower attaches to an equitable remainder in fee. *Greene v. Huntington*, 73 Conn. 106. To same effect, *Stroup v. Stroup*, 140 Ind. 179.

5. *Williams v. Kinney*, 43 Hun (N. Y.) 1; *Young v. Young*, 45 N. J. Eq. 27; *Yeo v. Mercereau*, 18 N. J. L. 387; *Tink v. Walker*, 148 Ill. 234; *Reed v. Whitney*, 7 Gray, 533; *Smallridge v. Hazlett*, 112 Ky. 841; *Bowen v. Lingle*, 119 Ind. 560; *Ble-*

vins v. Smith, 104 Mo. 583, 613, 614; *Lynn v. Gephart*, 27 Md. 547.

In *Stephens v. Leonard*, 123 Mich. 125, the court held that in Michigan dower does not attach to equitable estates. In this case, however, the husband had assigned his contract of purchase before his death.

See *James v. Upton*, 96 Va. 296, and *Everitt v. Everitt*, 71 Iowa 221, holding, under the statutes in those states, that the husband cannot defeat his wife's right of dower by transferring his interest under such contract of purchase before his death, she not joining in the transfer.

The husband must be owner of an equitable estate giving him the right to specific performance of the contract, on paying the balance of the purchase price, and doing the things which he was bound by his contract to do, and the wife's right of dower is subject to the payment of the purchase money. See cases also cited, and also *Walters v. Walters*, 132 Ill. 467.

Another case of a resulting trust arises where A buys and pays for real property, and has title taken in the name of B; a trust results in favor of A, the legal title being held by B for his benefit as *cestui que trust*. In New York the statute provides that no trust results in such case except for the benefit of creditors under certain conditions, unless title is taken by B either without A's knowledge or in violation of some trust. It has been held, therefore, that where the legal title is taken by a third party, in the absence of any trust, the right of dower does not exist since the husband who paid the purchase price, and on whose behalf the property was held by the third party or "dummy" was never seised, the seisin being in such third party.⁶ It is now well settled in New York, by decisions in which no question of dower arose, that in such cases a trust arises in spite of the statute from an agreement on the part of the third party or dummy that he is to hold the property for his principal and will convey it to him or at his direction, such a situation not coming within the terms of the statute.⁷ It would seem to follow that in any such case, where the husband dies having a right of action in equity to compel the party holding the title for his benefit to convey the property to him, his widow should be entitled to dower in the property, since the husband was equitable owner of the property at his death.⁸

6. *Phelps v. Phelps*, 143 N. Y. 197; *Nichols v. Park*, 78 App. Div. (N. Y.) 95; *Mann v. Edson*, 39 Me. 25; *Efland v. Efland*, 96 N. C. 488; *Babbitt v. Gaither*, 67 Md. 94.

7. The agreement of the third party to convey to the principal at his direction will be specifically enforced, though not in writing, the contract having been partly executed by the conveyance of the land to him and payment of the consideration by the principal, justice requiring that he

perform on his part. In other words, a trust results from his contract to so convey. *McKinley v. Hensen*, 202 N. Y. 24; *Jeremiah v. Pitcher*, 26 App. Div. (N. Y.) 402, and cases cited therein. *Smith v. Balcorn*, 24 App. Div. 437, N. Y. Real Prop. Law, § 94.

8. The right to dower in equitable estates of inheritance of which the husband dies seized is fully recognized in New York. *Hawley v. James*, 5 Paige 418; *Hicks v. Stebbins*, 3

In New York and in most of the other states a dry or naked trust, imposing no active duty on the trustee, is void, and the legal title passes directly to the beneficiary of such trust. In such case the beneficiary becomes seised of a legal estate, and the inchoate dower of his wife attaches.⁹

The wife of the trustee is not entitled to dower, since the trustee is not beneficially seised. To give his wife dower would be clearly in contravention of the trust and would be enjoined in equity. The husband's seisin must be for his own benefit, as beneficial owner of the property, in order that dower may attach, and a trustee's seisin is manifestly not of this description.¹⁰

§ 101. Dower in Joint Estates.—Dower does not attach to the interest of a joint tenant, since his interest is not one which his children will inherit, even though the joint tenancy be in fee. This arises from the peculiar nature

Lans. (N. Y.) 39; *Williams v. Kinney*, 43 Hun 1. In *Hawley v. James*, *supra*, the court expressly recognized the right of dower as attaching to a trust estate arising out of the taking of title by a third person who holds under an agreement to convey to the husband or at his direction, provided the husband is still owner of such trust interest at his death. (See opinion at p. 452.) In *Phelps v. Phelps*, 143 N. Y. 197, the husband was not yet dead, and his wife was seeking to have her dower right declared in his trust interest before his death. As her right of dower could not arise till his death, it is clear that she could not maintain her action. In *Nichols v. Park*, 78 App. Div. 95, it appeared that the husband was seized, at the most, if only an equitable estate before his wife divorced him, and that after the divorce he took title and transferred the property to

another. At his death, therefore, he was no longer owner of an equitable interest of which he was seized during coverture, and therefore his wife could not be entitled to dower. These cases, therefore, are not *contra* to the principle stated in the text, and if *Hawley v. Paige* will be followed, the law in New York is as there stated.

9. *Starbuck v. Starbuck*, 62 App. Div. (N. Y.) 437, at 450; *Wendt v. Walsh*, 164 N. Y. 154; *Newton v. Sly*, 15 Mich. 391; N. Y. Real Prop. Law, §§ 92, 93.

10. *Starbuck v. Starbuck*, 62 App. Div. (N. Y.) 437; *King v. Bushnell*, 121 Ill. 656; *Miller v. Miller*, 148 Mo. 113; *Hunkins v. Hunkins*, 65 N. H. 95; *Goddard v. Prentice*, 17 Conn. 546; *Firestone v. Firestone*, 2 Ohio St. 415; *Edmonson v. Welsh*, 27 Ala. 578; *McClure v. Fairfield*, 153 Pa. St. 411.

of the estate. Joint tenants are not seised of a separate undivided interest in the property like tenants in common, but are seised jointly with their co-tenants, exactly as though they together constituted a fictitious unity for the purpose, like that of husband and wife. When one of them dies the entire estate goes to the survivors, who, as the continuation of this unity, remain the owners of the property, and nothing passes to the heirs or devisees of the deceased joint tenant. There is nothing, therefore, to which dower can attach while the joint tenancy continues.¹ The wife of a tenant in common, however, is entitled to dower, since the interest of such a tenant descends to his heirs on his death.² A joint tenant is not only seised of the entire property as a member of the unity above referred to, but he has also an undivided interest arising out of his individual right of enjoyment which he may convey. When he conveys such an interest the joint tenancy is broken, the unities of time and title, which are essential to a holding by the several joint tenants as a unity being gone, and the purchaser of his interest holds as tenant in common, and his interest is therefore subject to dower. So, also, since the last survivor of the joint tenants takes by survivorship an estate in severalty, dower then attaches to his estate, it being no longer held subject to the possibility of survivorship.³

§ 102. Dower in Partnership Realty.—Partnership real estate, bought and paid for by the firm for firm purposes, is under no circumstances subject to dower under the English rule. The courts there hold that partners do not enter into a partnership to become proprietors of land, but to do

1. 1 Co. Litt. 37b; 1 Scribner 269; Lester, 6 Gray 314; Shiff v. Snyder, Babbitt v. Day, 41 N. J. Eq. 392; 121 Mo. 155; Whitney v. Whitney, Maybury v. Brien, 15 Pet. (U. S.) 45 N. H. 311; Hudson v. Steere, 9 R. 21; Cockrill v. Armstrong, 31 Ark. I. 106; Harris v. Coates, 6 Gray 580. See Ch. IX, *post*. (Mass.) 314.

2. Steltz v. Schreck, 60 Hun 74, 3. See last two notes preceding, affirmed, 128 N. Y. 263; Pynchon v. also Chap. IX, *post*.

business and make profits, and therefore it is presumed that in all cases they expressly or impliedly agree that when the firm is wound up the real property shall be sold like the other property of the firm, and the surplus remaining after the payment of debts shall be distributed as money. Therefore, applying the doctrine of equitable conversion, that equity will treat that as done which ought to be done pursuant to the agreement of the parties, equity treats partnership realty as converted into personalty, and on the death of either partner it is administered like the personal property of the firm. Therefore dower does not attach to partnership realty in England.⁴

In the United States the doctrine of equitable conversion has been held to apply in cases where there was an express agreement made between the partners, or one is to be reasonably inferred from the facts, that on the dissolution of the firm the real property is to be sold and the proceeds divided after payment of the debts, and in such cases the wives of the partners are not entitled to dower under any circumstances.⁵ In the absence of such agreement, however, the right of dower of the wife of each partner attaches to her husband's interest in the firm realty. Whether the legal title is in all the partners, or only in one no more of them, they hold such legal title as trustees for the firm.

4. Eng. Part. Act, 53 & 54 Vict. c. 39, §§ 20, 22; *Essex v. Essex*, 20 Beav. 442; *Darby v. Darby*, 3 Drew 495.

5. *Darrow v. Calkins*, 154 N. Y. 503; *Buckley v. Doig*, 188 N. Y. 238, and cases cited therein; *Parrish v. Parrish*, 88 Va. 529; *Mallory v. Russell*, 71 Iowa 63; *Greene v. Greene*, 1 Ohio 535.

In *Hughes v. Allen*, 66 Vt. 95, there was an express agreement between the partners that the real estate of the firm should not be sold or converted for the purpose of winding up

the affairs of the firm. The court held that because of this agreement the real property in question descended as realty, and was not subject to the doctrine of conversion for the purpose of paying firm debts, &c.

Though the question has not been raised in many states, it has been uniformly held where the question has arisen that the express agreement of the partners will control. It is safe to say that the same position will be taken in other states, as no other result is consistent with the principles of equitable conversion.

Therefore whenever the property is conveyed or mortgaged by the firm in the course of the partnership business, the interest of each partner is subject thereto, and the inchoate dower right of the wife of each partner will be defeated to that extent. It follows that it is not necessary for the wives of partners to join in firm deeds or mortgages made in the due course of the partnership business.⁶

On the dissolution of the firm the inchoate right of dower of the wives of the partners is subject to the sale of the real property if required for the purpose of paying firm debts and adjusting accounts between the partners. When the firm is fully wound up, its debts paid and the accounts or equities between the partners have been adjusted, the legal title to the partnership real property remaining unsold is still in the partners as tenants in common, but no longer subject to any trust in favor of the firm, and the wife of each partner has dower in her husband's interest exactly the same as in any case of a tenancy in common.⁷

This is the view which generally prevails in the United States, cases of equitable conversion arising out of the express agreement of the partners being few.

6. *Dawson v. Parsons*, 10 Misc. (N. Y.) 428; *Hauftman v. Haftman*, 91 App. Div. (N. Y.) 197; *Welch v. McKenzie*, 66 Ark. 251; *Mallory v. Russell*, 71 Iowa 63; *Woodward Holmes Co. v. Nudd*, 58 Minn. 236.

Where there were practically no debts of the firm, a sale by one partner to his copartner of his interest did not affect his wife's right of dower in the firm realty. *Young v. Thrasher*, 115 Mo. 222.

In New York the Court of Appeals has not yet passed on this question, and therefore the practice is to have the wives of parties join in such deeds and mortgages. Where the law on this point has not been settled in any

state the purchaser should insist upon the wives of the vendors joining.

7. *Darrow v. Calkins*, 154 N. Y. 503; *Buckley v. Doig*, 188 N. Y. 238; *Bopp v. Fox*, 63 Ill. 540; *Grissom v. Moore*, 106 Ind. 296; *Shearer v. Shearer*, 98 Mass. 107; *Dyer v. Clark*, 5 Metc. (Mass.) 562; *Free v. Beatty*, 95 Mich. 426; *Woodward Holmes Co. v. Nudd*, 58 Minn. 236; *Young v. Thrasher*, 115 Mo. 222; *Campbell v. Campbell*, 30 N. J. Eq. 415; *Sparger v. Moore*, 117 N. C. 449; *Espy v. Comer*, 76 Ala. 501; *Ferris v. Van Ingen*, 110 Ga. 102; *Foster's Appeal*, 74 Pa. St. 391; *Mowry v. Bradley*, 11 R. I. 370; *Clay v. Freeman*, 118 U. S. 97, and cases in preceding notes.

If, on the sale of the firm realty for the purpose of paying firm debts, a surplus of the proceeds of such sale remains after the firm debts are paid and accounts between the partners adjusted, such surplus is regarded as real property, since it represents so much of the realty as was not required for firm purposes, and the wife of each partner is entitled to dower in her husband's interest therein.⁸

§ 103. No Dower in Life Estates or Estates Pur Anter Vie.

— The right of dower cannot attach to these estates, since they are not estates of inheritance. On the death of the life tenant nothing of his estate remains to which dower can attach.⁹

§ 104. Dower in Estates in Fee Tail.—The law has always been well settled that dower attaches to an estate in fee tail, since it is an estate of inheritance, and the wife's right or estate of dower is not brought to an end by the termination of the estate tail on the death of the husband or his descendant without issue. Dower is an incident of estates of inheritance and the estate of dower, continuing for the life of the wife after the estate tail has come to an end, is regarded as an incident of the husband's estate.¹⁰ It is difficult to see how dower, which is an estate created by the law out of the husband's interest, can be greater than the estate of the husband out of which it is created. Here as in

8. See preceding note.

9. *Goodwin v. Goodwin*, 33 Com. 314.

10. Litt. § 53; 4 Kent Com. 49; *Tomlinson v. Nickell*, 24 W. Va. 148; *Smith's Appeal*, 23 Pa. St. 9; as to analogous case of curtesy, see *Holden v. Wells*, 18 R. I. 802.

The case where an estate in fee simple escheats to the state because the owner dies without heirs is very different. In that case the state takes the property because no one else is

entitled to it. The widow of the deceased owner in fee is entitled to her dower in the property, however, and the state takes the property subject to her dower. 4 Kent Com. 49. A fee tail estate is only part of the entire fee, being carved therefrom leaving a vested reversion or remainder, and the estate of such reversioner or remainderman is inconsistent with the widow's dower after the termination of her husband's estate tail.

many other cases arising in the law of property, the explanation for the rule is to be found in its historical development rather than in any fundamental principle of ownership.

§ 105. Dower in Estates Upon Condition and Estates Upon Limitation.—An estate upon condition is an estate subject to forfeiture for breach of a condition attached to the estate by the deed or will creating it. The mere breach of the condition does not terminate the estate; it simply gives to the grantor or his heirs, or the heirs of the devisor, as the case may be, a right to terminate the estate by making an entry or by bringing an action of ejectment.¹ Estates upon limitation are estates limited upon the happening of some uncertain event in the future, as where property is granted or devised to A and his heirs until B returns from Rome, or as long as St. Paul's Cathedral shall stand. Words of limitation or duration such as "while," "until," "as long as," etc., are used in creating such estates. The estate comes to an end immediately on the happening of the limitation and the property reverts back immediately to the grantor or his heirs, or to the heirs of the devisor, as the case may be.² Estates upon condition or upon limitation may be for years, for life, in fee tail or in fee simple. When such estates are created in fee tail or fee simple dower attaches as in any case of an estate of inheritance, but the termination of an estate upon condition by entry for breach of the condition on which it was limited, or the termination of the estate upon limitation by the happening of the limitation, immediately puts an end to dower, whether inchoate, consummate, or actually set off as a life estate in the widow. In these cases the courts have been governed by the fundamental principles of ownership logically applied, holding that dower created out of the husband's estate must necessarily come to an end when the estate of the husband is

1. See Ch. X, *post*.

2. See Ch. X, *post*.

brought to an end by the entry for breach of condition or by the happening of the limitation, as the case may be. This has always been the law, both before the Statute of Uses and the Statute of Wills, referred to in the following section, and since the enactment of those statutes.³

§ 106. Dower in Estates Upon Conditional Limitation.—

An estate upon conditional limitation is created where property is granted or devised to A in fee, but on the happening of some future and contingent event it is to go over to B in fee. The estate in B could not be created as an estate at law before the Statute of Wills and the Statute of Uses, enacted within a brief interval during the reign of Henry VIII. The reason was that, according to the reasoning of the courts, a fee could not be mounted on a fee. Having created a fee in A and his heirs the entire estate of the grantor or deviser was disposed of, and there was nothing left to limit over to B. A future estate could be created only by way of remainder, and as there could be no remainder after a fee, it followed no such estate now known as a conditional limitation could be created. Under the Statute of Wills, which permitted, for the first time, the devising of property by will, the courts gave effect to the intention of the testator in such cases, and gave effect to estates upon conditional limitation as executory devises. By the Statute of Uses such estates could be created by means of the new forms of conveyancing which grew up under that statute. Such estates were created by way of shifting use. A full discussion of the effect of these statutes, and of estates created under them as executory devises, or by way of springing or shifting use will be found hereafter.⁴ It is sufficient at this point to understand that by virtue of these

3. 1 Scribner 197, 297; 4 Kent v. Harris, 6 Metc. (Mass.) 475, and Com. 49; Beardslee v. Beardslee, 5 cases cited under § 106. Barb. (N. Y.) 24; Greene v. Reynolds, 72 Hun (N. Y.) 565; Emerson

4. See Ch. XIII, *post*.

statutes estates by way of conditional limitation could be created as valid legal estates from the time of the enactment of these statutes till the present time.

It would seem to follow from the cases of estates upon condition and upon limitation that the termination of an estate in fee by the happening of a limitation on which it was to go over to another, would necessarily bring to an end the right of dower of the wife of the holder of such estate. Nevertheless the rule is established in England and in several of the states that the wife's dower will not be affected by the termination of her husband's estate, and the one to whom the estate is limited over, on the happening of the contingency, must take it subject to the right of dower of the wife of the former holder in fee whose estate is terminated by the happening of the contingency.⁵ The reasoning of these cases seems to be this: Under the old common law, before the Statute of Uses and the Statute of Wills, dower of the wife could not be affected by the taking effect of an estate on conditional limitation, bringing to an end the precedent estate of the husband in fee, since conditional limitations did not then exist, and could not be created. Such estates are valid only by statute, which

5. 1 Washb. R. P. 212, *et seq.*; Buckworth v. Thirkell, 3 Bos. & P. 652, note; Moody v. King, 2 Bing. 447; Hatfield v. Sneden, 54 N. Y. 280 (involving the question of curtesy in such case, in effect overruling Weller v. Weller, 28 Barb. (N. Y.) 588); Evans v. Evans, 9 Pa. St. 190; Kennedy v. Kennedy, 29 N. J. L. 185; Pollard v. Slaughter, 92 N. C. 72; Jones v. Hughes, 27 Grat. (Va.) 560; Chew v. Chew, 1 Md. 163; Northcut v. Whipp, 12 B. Mon. (Ky.) 65.

In Adams v. Beekman, 1 Paige (N. Y.) 631, and Weller v. Weller, 28 Barb. (N. Y.) 588, the contrary rule was followed, the court in each case

holding, very properly, that as dower is an incident of the husband's estate, growing out of such estate as a part of it, anything which terminates the estate will also bring dower to an end. These cases are in effect overruled by Hatfield v. Sneden, 54 N. Y. 280, which case follows the reasoning in Washburn on Real Property, 212 *et seq.*, the case involving the effect of a conditional limitation on curtesy, holding that it was not affected by the termination of the wife's estate by the happening of the limitation on which the fee was to pass over to another.

statutes have not expressly provided that dower shall be destroyed by the vesting of such estates. Therefore dower, which attaches to the first estate in fee, is not affected by the termination thereof on the happening of the event on which the estate over on conditional limitation is to take effect. On the other hand the termination of estates upon condition or upon limitation necessarily put an end to the wife's dower, since these estates were recognized as valid under the old common law before these statutes, and such estates are terminated in accordance with the law as it then existed.⁶

The fallacy of this reasoning lies in the attempted distinction at this time between these classes of estates. Since the enactment of these statutes, during the centuries which have passed since the reign of Henry VIII, estates upon conditional limitation have been valid estates at law, and the estate of the first holder comes to as complete and valid a legal ending as do estates upon condition or upon limitation. If the termination of the one class of estates should put an end to dower in the wife of the holder, then the same result should follow from the termination of estates of the other class. There can be no question but that the rule which permits the wife an estate in dower after her husband's estate has been terminated in a way which has been recognized as legal for several hundred years, is contrary to fundamental principles, and contrary to the principles of the ancient common law as applied to estates upon condition and upon limitation. That conditional limitations could not affect dower before the statutes above referred to is no argument, since conditional limitations had no existence at that time. Present law should be settled in accordance with present conditions, not in accordance with a situation which has ceased to exist for hundreds of years.

6. 1 Washburn on R. P. 212 *et seq.*;
Hatfield v. Sneden, 54 N. Y. 280, and
other cases in preceding note.

The cases which hold that dower is brought to an end by the vesting of an estate upon conditional limitation are entirely sound,⁷ though as we have seen, the prevailing view is contra.

E.—The Inchoate Right of Dower.

§ 107. **Nature of the Inchoate Right.**—On the concurrence of marriage and seisin the inchoate right of dower arises. It is not an estate in the land. It cannot be conveyed, assigned or mortgaged, and is capable only of extinguishment.⁸ It is only a possibility in the wife, in case she survives her husband, of acquiring a right as against the heir or devisee or grantee of her husband, to have a life estate in one-third of the property set off to her. It is, however, an interest in the property, though not amounting

7. *Adams v. Beekman*, 1 Paige (N. Y.) 631; *Weller v. Weller*, 28 Barb. (N. Y.) 588; *Edwards v. Bibb*, 54 Ala. 475.

Prof. Tiffany, in his excellent work on the Modern Law of Real Property (Vol. 1, p. 431, note), suggests a reason for the prevailing rule which has not been advanced, apparently, in the extensive discussion of this subject by judges and legal writers. He says that estates upon condition and upon limitation are base fees, in their nature subject to termination on the happening of the contingency on which they depend, but that an estate in fee, subject to be defeated by the taking effect of another estate in the same property on the happening of a contingency, is an estate in fee simple; that an express direction that dower should not attach, or should be limited in any way would be void, as repugnant to the estate; and that no greater effect should be given an executory limitation as implying such a direction. But does this question

depend at all on whether the grantor or deviser desires to limit dower or not? Is it not true that the estate held subject to the conditional limitation, whether it be called a base or qualified fee or a fee simple, is nevertheless an estate which will come to an end on the happening of the limitation, absolutely and in accordance with the principles of law which have prevailed since the reign of Henry VIII? The reason why dower should be defeated is that the estate of the husband from which it was derived has come to an end. Dower in such case is defeasible because the estate of the husband is defeasible, not because of any attempted limitation upon dower as an incident of estates of inheritance.

8. *Witthaus v. Schack*, 105 N. Y. 332; *Cravens v. Winzenberger*, 97 Ill. App. 335; *Atwood v. Arnold*, 23 R. I. 609; *Jewett v. Feldheiser*, 68 Ohio St. 523 and cases in notes which follow under this section.

to an estate, of which the wife cannot be deprived by any act of the husband or of any other person. A conveyance or mortgage executed and delivered by the husband, in no way affects the wife's inchoate right, unless she joins in the deed or mortgage,⁹ nor is it affected by the liens of judgments secured against the husband,¹⁰ nor by the husband's bankruptcy or insolvency.¹ In each and every case her right of dower is superior to any title or lien which may be acquired by a third party from her husband during coverture, unless she has released or extinguished it for the benefit of such title or lien.²

The inchoate right of dower is a valuable property right in the wife which the courts will protect. Therefore it has been held that where her signature has been forged to a deed executed by her husband, an action will lie to declare

9. *Sutherland v. Sutherland*, 69 Ill. 481; *Stewart v. Stewart*, 5 Conn. 317; *Griscom v. Moore*, 106 Ind. 296; *Wallace v. Harris*, 32 Mich. 380; *Grady v. McCorkle*, 57 Mo. 172; *Royston v. Royston*, 21 Ga. 161; *Guerin v. Moore*, 25 Minn. 462.

10. *Hinchliffe v. Shea*, 103 N. Y. 153; *Lowry v. Smith*, 9 Hun (N. Y.) 514; *Temperance House v. Fowle*, 22 Oreg. 303. See, also, cases in notes which follow.

1. *Mills v. Ritter*, 197 Pa. St. 353; *Chase v. Van Meter*, 140 Ind. 321; *Dwyer v. Garlough*, 31 Oh. St. 158.

2. Therefore loss of title by the husband through adverse possession does not affect the wife's dower right. *McIntyre v. Costello*, 47 Hun 289; *Winters v. DeTurk*, 133 Pa. St. 359; *Taylor v. Lawrence*, 148 Ill. 388; *Lucas v. Whiteacre*, 121 Iowa 251; *Cowan v. Lindsay*, 30 Wis. 586; *Dunham v. Angier*, 20 Me. 242; *Williams v. Williams*, 89 Ky. 381; *Hart v. McCollum*, 28 Ga. 478.

In England and in several of the states statutes have been enacted providing that the wife shall be entitled to dower only in the land of which the husband is seized at the time of his death. By the English Dower Act, 3 & 4 William IV, ch. 105, the wife's dower will not attach in case the husband conveyed the property during his life, or devised it by his will. Cases involving dower under such statutes in the different states follow: *Stewart v. Stewart*, 5 Conn. 317; *Flowers v. Flowers*, 89 Ga. 632 (holding that conveyance under such a statute must be a real and not a pretended conveyance in which beneficial ownership and possession is retained, in order to defeat dower); *Sykes v. Sykes*, 49 Miss. 190; *Hopkins v. Bryant*, 85 Tenn. 520. In North Carolina such a statute was repealed and the common law of dower restored. *Sutton v. Askew*, 66 N. C. 172.

the deed void in so far as it purports to bar her right of dower.³ So, also, in a case where husband and wife were induced to join in the conveyance of the husband's property through the fraud of the defendant, it was held that the wife's inchoate dower was such an interest that she might maintain an action as joint party plaintiff with her husband to recover the damages sustained through its loss.⁴

Though a valuable contingent interest in property it is not a vested property right, and therefore it may be modified or abolished altogether by statute, without violating the constitutional provision forbidding laws impairing vested property rights.⁵ In several states dower has been abolished and other provisions have been made in favor of wives in lieu thereof. Such statutes are constitutional though abolishing inchoate rights of dower then existing.⁶

§ 108. Eminent Domain; Effect on Inchoate Dower.—
~~When land is taken for public use by right of eminent domain, it is not necessary to make the wife a party to the~~

3. *Clifford v. Kampfe*, 147 N. Y. 383. To same effect, *Buzick v. Buzick*, 44 Iowa 259.

4. *Simar v. Canaday*, 53 N. Y. 298. That the inchoate right of dower is a substantial property right, the value of which is capable of being estimated, and which the courts will protect, is generally recognized. In addition to the cases cited in this and the preceding note, see *Mandel v. McClave*, 46 Ohio St. 407; *Gore v. Townsend*, 105 N. C. 228; *Adler Co. v. Hellman*, 55 Neb. 266; *McClurg v. Schwartz*, 87 Pa. St. 521. The dictum in *Moore v. N. Y. City*, 8 N. Y. 110, that inchoate dower is not property, the value of which may be estimated, has been generally disapproved. See cases above cited, and also *Wheeler v. Kirtland*, 27 N. J. Eq. 534; *Matter of*

Brooklyn Bridge, 75 Hun (N. Y.) 558, affirmed, 143 N. Y. 640.

5. *Virgin v. Virgin*, 189 Ill. 144; *Guerin v. Moore*, 25 Minn. 462. See, also, cases under § 108, *post*, relating to lands taken under the power of eminent domain. See, *contra*, *In re Alexander*, 53 N. J. Eq. 96, holding that the act providing for the barring of the inchoate dower of insane wives does not apply to inchoate dower existing at the time the act took effect; as to such dower rights it would be unconstitutional.

6. *May v. Fletcher*, 40 Ind. 575; *Hatch v. Small*, 61 Kan. 242. For statutes abolishing dower and substituting some other provision for wives, generally as heirs, out of their husband's property, see 1 Stim. Am. St. L. §§ 3105(A), 3109; 3202(B).

proceeding, as her inchoate dower is inferior to the right of the state to take land for a public purpose. Her interest is in no sense a vested right or estate, but a mere inchoate possibility, and therefore statutes enacted by the legislature under which title to the land is acquired by eminent domain, and compensation for the value of the entire fee is paid to the husband, are constitutional, and the wife's inchoate dower in the property so taken is destroyed.⁷ Though she has no further claim to dower in the property so taken, her dower right attaches to the proceeds of the property awarded to the husband, and if she intervenes before the money has been paid over to the husband and therefore before the court has lost control thereof, the court will order either that one-third of the award be invested and held to await the event of the wife's surviving her husband,⁸ or,

7. *Moore v. City of New York*, 8 N. Y. 110; *Wheeler v. Kirtland*, 27 N. J. Eq. 534; *French v. Lord*, 69 Me. 537; *Flynn v. Flynn*, 171 Mass. 312; *Chouteau v. Missou. Pac. R. Co.*, 122 Mo. 375.

Where dower has become consummated by death of the husband, the widow must be made a party to the condemnation proceeding and be awarded compensation, since her dower is then a vested interest. *York v. Welsh*, 117 Pa. St. 174; *In Re Williams, &c. Streets*, 19 Wend. (N. Y.) 678. Where land is dedicated by the husband to public use, as for the purpose of a street, the inchoate dower of the wife is destroyed, for like reasons. 1 *Scribner* 582; *Duncan v. Terre Haute*, 85 Ind. 104; *Venable v. Wabash W. R. Co.*, 112 Mo. 103 (in which case it was held that land conveyed to a railroad company for a right of way was in effect dedicated to a public use, and therefore the wife's inchoate dower was barred,

though she did not join in her husband's deed. To same effect, *Chicago, &c. R. Co. v. Titterington*, 84 Tex. 218).

In *Nye v. Taunton Br. R. Co.*, 113 Mass. 277, the court held in a similar case that since the railroad company did not take the land under the power of eminent domain but by deed, they took it subject to all the incidents attending that form of transfer, and therefore subject to inchoate dower. It is difficult to see how the conveyance of land to a railroad company for the purpose of a right of way can amount to a dedication of the land to public use within the meaning of the cases and statutes on such dedication, and within the meaning of the rule that the dedication and acceptance of land for streets, &c., will bar inchoate dower. The rule in Massachusetts would therefore seem to be the better law.

8. *Matter of Brooklyn Bridge*, 75 Hun (N. Y.) 558, affirmed without

if the parties prefer, a sum in gross will be paid to the wife representing the then value of her inchoate right.⁹ The taking of the property by condemnation proceedings may be likened to the foreclosure of a mortgage to which the right of dower is subject. In each case the wife's dower right is transferred from the land to the moneys which the husband is entitled to; the award in the case of condemnation proceedings, the surplus money in the case of the foreclosure of the mortgage.¹⁰

The reason why inchoate dower is subject to the right of the state, either where the land is taken in condemnation proceedings for a public purpose, or where the husband dedicates land to a public use without his wife's consent, must be looked for in the historical development of the law, rather than in any controlling principle of ownership applicable to the situation.¹¹

§ 109. Release of Inchoate Dower by Wife.— We have seen that a wife cannot convey, mortgage or otherwise transfer or incumber her inchoate dower since it is not an estate or interest which can be alienated. It can only be barred, released or extinguished.¹ A release made to the husband while the marital relation exists is void.² This was true at common law, because of the disability of coverture. Under the various married woman's acts, giving to married women the rights over their property which they

opinion, 143 N. Y. 640; *Id.*, 89 Hun 219; *contra*, *Flynn v. Flynn*, 171 Mass. 312.

9. *Wheeler v. Kirtland*, 27 N. J. Eq. 534. This, however, seems to be based on the consent of the parties. In the absence of such consent one-third of the award must be invested as above stated. See *Citizens Sav. Bank v. Mooney*, 26 Misc. (N. Y.) 67; *Emigrant Ind. Sav. Bank v. Regan*, 41 App. Div. (N. Y.) 523.

10. See § 98, *ante*, and note 12 thereunder.

11. See 1 Scribner, *Dower*, 582.

1. See § 107, *ante*.

2. *Crain v. Cavana*, 36 Barb. (N. Y.) 410; *Townsend v. Townsend*, 9 Sandf. (N. Y.) 711; *Rowe v. Hamilton*, 3 Me. 63; *Walsh v. Kelly*, 34 Pa. St. 84; *Laud v. Shipp*, 98 Va. 284; *Martin v. Martin*, 22 Ala. 86; *Pillow v. Wade*, 31 Ark. 678.

would have if unmarried, the same rule holds true in the absence of express provision giving her such right.³

A wife may release her inchoate dower by joining in a deed or mortgage with her husband.⁴ In such case she relinquishes her right only for the benefit of the title made by the deed or mortgage, and therefore, if for any reason the deed or mortgage of the husband is void, or is set aside for fraud, her right of dower will arise again as though she had never joined in the instrument. This is because it is incapable of separate extinguishment apart from the transfer or incumbrance of her husband's estate in the land, and if the transfer or incumbrance was never valid, or has been set aside and rendered void for any reason, her dower right necessarily remains unaffected.⁵ For the same reason, if

3. *Flynn v. Flynn*, 171 Mass. 312; *Graham v. Van Wyck*, 14 Barb. (N. Y.) 531; *Rhodes v. Davis*, 51 Mich. 306.

In New York, § 206 Real Prop. L., provides that where husband or wife has secured either an absolute or limited divorce against the other, the wife may release to her husband by instrument sufficient to pass real estate her inchoate right of dower in any specific real property theretofore owned by him, or generally in all such real property, and such as he shall thereafter acquire. See *Savege v. Crill*, 19 Hun (N. Y.) 4, and *Rhoades v. Davis*, 51 Mich. 306.

4. *Hinchliffe v. Shea*, 103 N. Y. 153; *Elmendorff v. Lockwood*, 57 N. Y. 322; *Witthaus v. Schack*, 105 N. Y. 332; *Taylor v. Lawrence*, 148 Ill. 388; *Scanlon v. Scanlon*, 134 Ill. 63; *Goodheart v. Goodheart*, 63 N. J. Eq. 746; *Youst v. Hayes*, 90 Ind. 413; *Sykes v. Sykes*, 49 Miss. 190.

The wife must sign the deed—merely assenting thereto is not

enough. *Davis v. McDonald*, 42 Ga. 205.

The wife must not only sign the instrument, but her name must appear as a grantee in the body of the deed, with appropriate language of grant or release, or there must be a formal release of her dower in some part of the deed. Merely signing the deed or mortgage is not sufficient. *Catlin v. Ware*, 9 Mass. 218; *Stearns v. Swift*, 8 Pick. (Mass.) 532; *Lathrop v. Foster*, 51 Me. 367; *Johnson v. Montgomery*, 51 Ill. 485; *Dustin v. Steele*, 27 N. H. 332-431; *Davis v. Bartholomew*, 3 Ind. 485; *Gillilan v. Swift*, 14 Hun (N. Y.) 574.

5. *Marvin v. Smith*, 46 N. Y. 571; *Duncklee v. Butler*, 25 Misc. (N. Y.) 680; *Smith v. Howell*, 53 Ark. 279; *Stinson v. Sumner*, 9 Mass. 143; *Stowe v. Steele*, 114 Ill. 382; *Morton v. Noble*, 57 Ill. 176; *Crawford v. Hazelrigg*, 117 Ind. 73; *Woodworth v. Paige*, 5 Oh. St. 70.

Deeds set aside because of fraud—*Malloney v. Horan*, 49 N. Y. 111:

a mortgage in which the wife has joined with her husband is satisfied and discharged in any way except by foreclosure, her right of dower is restored exactly as though she had never joined. Where, for instance, the mortgage debt is paid by the husband, from his personal property before or after his death, whether voluntarily or as the result of a personal judgment on the debt, enforced against the husband's personal estate, the mortgage comes to an end as soon as the debt which it secures is satisfied, and the wife's right of dower in the land in question is no longer subject to the mortgage.⁶ So, where the mortgage lien is destroyed by the enforcement of a prior superior lien, as by the sale of the property in the enforcement of the lien of a prior judgment or mortgage to which the dower right of the wife is not subject, her dower is restored exactly as it was before she joined in the mortgage so wiped out.⁷

§ 110. Payment of Mortgage by Purchaser of Husband's Estate.— In one class of cases the payment of the mortgage debt does not bring about this result. Suppose A executes a mortgage on his property, in which mortgage his wife joins. Later he sells the property subject to the mort-

Frederick v. Emig, 186 Ill. 319; Kitts v. Wilson, 130 Ind. 492; Richardson v. Wyman, 62 Me. 280; Ridgway v. Mastig, 23 Oh. St. 294; Nunger v. Perkins, 62 Wis. 499; Wells v. Estes, 154 Mo. 291.

But where the deed in which the wife joined is not void and has not been set aside, her right of dower is gone absolutely, not only as to the grantee and his privies, but also as to anyone else having any interest in the property. Elmendorf v. Lockwood, 57 N. Y. 322; Boorum v. Tucker, 51 N. J. Eq. 135; Morton v. Noble, 57 Ill. 176; Johnson v. Van Velsor, 43 Mich. 208.

6. Hinchliffe v. Shea, 103 N. Y.

153; Mayo v. Hamlin, 73 Me. 182; Hatch v. Palmer, 58 Me. 271; McCabe v. Swap, 14 Allen (Mass.) 188; Atkinson v. Stewart, 46 Mo. 510; Peckham v. Hadwen, 8 R. I. 160; Hastings v. Stevens, 29 N. H. 564.

7. Hinchliffe v. Shea, 103 N. Y. 153.

Where the mortgage in which she joined is foreclosed, and she is made a party defendant, her dower right in the property is foreclosed and destroyed, but, as we have seen, such right then attaches to the surplus money that may remain after the mortgage debt is paid. See § 98, *ante*, note 12 thereunder.

gage to B, his wife not joining in the deed. Subsequently B pays off the mortgage. On the death of A, his wife's dower is still limited to the equity of redemption, spite of the fact that the mortgage debt has been paid and the mortgage satisfied. There is no question about this result where B, the purchaser, takes an assignment of the mortgage when he pays it off, and does not satisfy it of record, as it is clear that he does not intend a merger of his title to the property and the mortgage, and the mortgage continues a valid lien on the property against the wife's right of dower.⁸ In some states it is held that if such an assignment is not taken, and the mortgage is satisfied of record, the mortgage is discharged even as against the wife, and her right of dower attaches free and clear of the mortgage.⁹ But the best considered cases hold that the doctrine of subrogation applies in such a case, that B, the purchaser, is subrogated to the position of the mortgagee, and in equity will be regarded as holding the mortgage exactly as the mortgagee held it, or as though assigned to him by the mortgagee, so that the dower right of A's (the grantor's) wife will still be subject to the mortgage, though in fact the mortgage has been satisfied and extinguished. This would seem to be a clear case for the application of the equitable doctrine of subrogation, since the payment of the mortgage was made by the purchaser solely for his own benefit, not because he had bound himself to pay it, and to permit the result which would follow at law, giving the wife of the vendor dower in the property free from the mortgage, would be a manifest injustice. To prevent this equity treats the purchaser as subrogated to the position of the mortgagee to whom he paid the money; by this fiction the wife's dower remains subject to the mortgage in which she joined.¹⁰

8. *Lee v. James*, 81 Ky. 443; *Bryar's Appeal*, 111 Pa. St. 81; *Strong v. Converse*, 8 Allen 557; *Gibson v. Crehore*, 3 Pick. 475; *Lake v. Nolan*, 81 Mich. 112; *Thompson v. Boyd*, 21 N. J. L. 58.

9. *Atkinson v. Angert*, 46 Mo. 515. See preceding note.

10. *Everson v. McMullen*, 113 N. Y. 293; *Popkin v. Bomstead*, 8 Mass. 491; *Chiswell v. Morris*, 14 N. J. Eq. 101.

If in the above case B, the purchaser, had expressly assumed the payment of the mortgage debt, he would be bound by his covenant of assumption to make the payment. In such case he becomes the primary debtor, A, the mortgagor, being liable as surety. Therefore when B pays off the mortgage he is doing only what he bound himself to do. The husband secured the covenant of assumption as part of the consideration for the conveyance of the property, and the subsequent payment by B is the same as though A had paid the mortgage debt himself. Therefore there is no reason for the intervention of a court of equity by applying the doctrine of subrogation, and A's wife will be entitled to dower in the property free and clear of the mortgage.¹

§ 111. **Separate Release to Husband's Grantee.**—A wife cannot release her dower to one having no interest or estate in the property at the time the release is made, since such a release could only operate as a conveyance, and inchoate dower cannot be conveyed.² She may, however, release to a grantee of her husband or any subsequent grantee holding the property subject to her right of dower, provided at the time of the release he is owner of the property,³ or has conveyed the property by deed of warranty by virtue

1. *Bartlett v. Musliner*, 28 Hun (N. Y.) 235.

See note 8 preceding. The reasons given by the court appear in the text. But is it not true, in this case as where the mortgage is not assumed, that the wife of the grantor is given a life estate in one-third of the amount paid by the grantee in discharging the mortgage, a result as clearly inequitable in this case as in the other, since in each case he purchases the property on exactly the same basis, the amount of the mort-

gage being deducted from the full purchase price of the property?

2. *Flynn v. Flynn*, 171 Mass. 312; *Marvin v. Smith*, 46 N. Y. 571; *Fletcher v. Shepherd*, 174 Ill. 262; *Heisen v. Heisen*, 145 Ill. 658; *French v. Lord*, 69 Me. 537; *White v. White*, 16 N. J. L. 202; *Frey v. Boylan*, 23 N. J. Eq. 90; *Ridgway v. Masting*, 23 Ohio St. 294; *Johnston v. Smith*, 70 Ala. 108.

3. *Harriman v. Gray*, 49 Me. 537; *Saunders v. Blythe*, 112 Mo. 1; *Gray v. McCune*, 23 Pa. St. 447 (release to son as presumptive heir held valid).

of which he might be held liable in case the right of dower should be subsequently enforced. In such case the release of dower is taken in discharge of the covenant of warranty in so far as it is broken through the outstanding right of dower.⁴

§ 112. Dower Barred by Misconduct of Wife.—By the terms of the statute of Westminster Second (13 Edw. I, c. 34), it was provided that in case a wife elope from her husband and thereafter live in adulterous relation with her paramour, she should be deprived of her dower unless she should become reconciled with her husband and be taken back by him. Prior to this statute wives did not lose their dower because of misconduct.⁵ In several of the states there are somewhat similar statutes, which provide generally that if a wife desert her husband and live in adultery thereafter she shall be barred of dower. Adultery alone is not a bar; there must be desertion of the husband by the wife followed by living in adulterous relation.⁶

§ 113. Effect of Divorce on Dower.—As a general rule in most states adultery or other misconduct of the wife, even though accompanied by abandonment, does not bar dower unless followed by a divorce dissolving the marriage. Divorce, whether secured by the husband against the wife for her misconduct, or by the wife against the husband for

4. Hull v. Glover, 126 Ill. 122; La Framboise v. Grow, 56 Ill. 197; Chicago Dock Co. v. Kinzie, 49 Ill. 289; Robbins v. Kinzie, 45 Ill. 354.

A release to one who has reconveyed the property without covenants of warranty is void. Harriman v. Gray, 49 Me. 537.

5. Co. Litt. 32a; 2 Bl. Com. 130.

6. Owen v. Owen, 57 Ind. 291; Payne v. Dotson, 81 Mo. 145; Wilson v. Craig, 175 Mo. 362; Cogswell v. Tibbetts, 3 N. H. 41; Heslop v.

Heslop, 82 Pa. St. 537; Reel v. Elder, 62 Pa. St. 308; Phillips v. Wiseman, 131 N. C. 402; McQuinn v. McQuinn, 110 Ky. 321.

It is provided in some states that if the desertion by the wife is due to cruelty or other misconduct of the husband, her subsequent adultery does not bar dower. Heslop v. Heslop, 82 Pa. St. 557; Beaty v. Richardson, 56 S. C. 173; Rawlins v. Buttell, 1 Houst. (Del.) 224.

his fault, ~~puts an end to inchoate dower, since it ends the martial relation out of which the dower right arose and on which it depends, unless saved by express statutory provision preserving the dower right in cases where the wife is the innocent party.~~⁷ In New York and several other states there is express provision by which the dower right of the innocent divorced wife is preserved.⁸ Her right in such case attaches only to the property of which the husband was seized during coverture, that is, up to the time the divorce is secured against him; it does not attach to property of which he may become seized after the divorce, since in such case the requisite of seizin during coverture is lacking.⁹ If a divorce is secured against the wife in another jurisdiction for a cause which is not a ground for

7. *Barrett v. Failing*, 111 U. S. 523; *Schiffer v. Pruden*, 64 N. Y. 47; *Hood v. Hood*, 110 Mass. 463; *Moulton v. Moulton*, 76 Me. 85; *Kent v. McCann*, 52 Ill. App. 305; *Fletcher v. Monroe*, 145 Ind. 56; *Winch v. Bolton*, 94 Iowa 573; *Pullen v. Pullen*, 52 N. J. Eq. 9; *Calome v. Calome*, 24 N. J. Eq. 440; *Miltimore v. Miltimore*, 40 Pa. St. 151; *Carr v. Carr*, 92 Ky. 552; *Hindson v. Bush*, 84 Ala. 368; *Gleason v. Emerson*, 51 N. H. 405.

For American statutes providing that divorce bars dower, see 1 Stim. Am. St. Law, § 3246 (c.).

Where husband and wife were both found guilty of adultery, and for that reason no divorce was granted either party, it was held that the wife's right of dower was not affected. *Schiffer v. Pruden*, 64 N. Y. 47.

8. N. Y. Code Civ. Pro. § 1759, subd. 4; 1 Stim. Am. St. Law, § 3246 (c); *Kirkpatrick v. Kirkpatrick*, 197 Ill. 144; *Scales v. Scales*, 65 Mo. App. 292; *Stilson v. Stilson*, 46 Conn.

15; *Percival v. Percival*, 56 Mich. 297.

When after such a divorce the wife receives alimony in lieu of dower, she cannot also have dower. *Adams v. Storey*, 135 Ill. 448; *McKean v. Ferguson*, 51 Ohio St. 207.

Of course divorce of the wife for her misconduct bars dower absolutely. See cases in preceding note, also *Rendleman v. Rendleman*, 118 Ill. 257; *Van Cleaf v. Burns*, 118 N. Y. 549.

9. *Matter of Ensign*, 103 N. Y. 284; *Starbuck v. Starbuck*, 173 N. Y. 503; *Kade v. Lauder*, 18 Abb. Pr. (N. S.) 288; *Nichols v. Park*, 78 App. Div. (N. Y.) 95, 99.

The right of dower of an innocent divorced wife is not affected by the subsequent marriage of her former husband. *Stahl v. Stahl*, 114 N. Y. 375. See *Rice v. Lumley*, 10 Oh. St. 596, holding that where the innocent divorced wife remarries she loses dower in the property of her former husband.

divorce in New York, such divorce will not affect her right of dower as it existed up to the time of the divorce in lands situated in New York, since she has not been divorced on the ground of adultery, which alone bars her dower in that state.¹⁰ If the divorce is valid her dower right in such case will not attach to property in New York subsequently acquired by the husband, since there would be no seizin during coverture.¹¹

Where a limited divorce is secured by either party against the other, amounting to a judicial separation of the parties from bed and board, the marital relation continues and the wife's right of dower is not affected,¹² unless pursuant to the statute in some states provision is made for the wife by the judgment in lieu of dower.¹³

10. *Van Cleef v. Burns*, 118 N. Y. 549, 133 N. Y. 540. See, also, on effect of foreign divorces on dower. *McGill v. Deming*, 44 Oh. St. 645; *Chapman v. Chapman*, 48 Kan. 636; *Gould v. Crow*, 57 Mo. 200; *Hawkins v. Ragsdale*, 80 Ky. 353.

11. *Starbuck v. Starbuck*, 173 N. Y. 503. In this case it appeared that the wife had secured a decree against the husband in Massachusetts which was void in New York, because personal jurisdiction over the husband had not been secured. It was held that the wife was estopped from denying the validity of the divorce in an action for dower in land in New York subsequently acquired by her husband.

See *Voke v. Platt*, 48 Misc. (N. Y.) 273, the court at special term holding that where the wife secured a divorce in Kansas on the ground of cruelty (not recognized as a ground for divorce in New York) without personal service on or appearance by the husband, she at least was bound by the decree, and could not claim dower either in land subsequently acquired

by the husband or even in land of which he was seized before the divorce. Though an innocent divorced wife, she did not secure the divorce on the ground of adultery, and therefore she did not come within the statute preserving her right of dower in case of divorce secured for the husband's misconduct. The principle of this case was overruled in *Van Blarincm v. Larson*, 205 N. Y. 355, the court holding that a wife who secured a valid divorce from her husband in another state on other than the New York statutory ground was entitled to dower in lands of which he was seized during coverture up to the divorce, the view being taken that in New York the wife will be deprived of dower only in case she is divorced for her adultery.

12. *Co. Litt.* 32a; 2 Bl. Com. 130; *Crain v. Cavana*, 62 Barb. 109; *Hokamp v. Hagaman*, 36 Md. 511; *Taylor v. Taylor*, 93 N. C. 418; *Howell v. Thompson*, 95 Tenn. 396.

13. *Gallagher v. Gallagher*, 101 Wis 202, the statute in Wisconsin per-

F.—Jointures and Testamentary Provisions in Lieu of Dower.

§ 114. **Jointures, Legal and Equitable.**—Jointures, defined as “a competent livelihood of freehold for the wife, of lands and tenements, to take effect, in profit and possession, presently after the death of the husband for the life of the wife at least,” were first made a bar to dower by the Statute of Uses (27 Henry VIII, c. 10, § 6). Before that statute a great part of the land of England was held subject to uses. The wife of the trustee to uses was not entitled to dower because her husband was not beneficially seized. The *cestui que use*, who was the beneficial owner of the property, did not have an interest which gave his wife dower because equity refused to follow the law in this respect, and refused to recognize dower as an incident of equitable estates. Therefore property held subject to uses which as we have seen constituted most of the land of England, was not subject to dower, and it became usual, on marriage, to make voluntary provision in favor of the wife, by conveying to husband and wife jointly for their lives, some particular piece of property, which the wife would take by survivorship on the death of her husband. The Statute of Uses changed uses into legal estates so that holders of the beneficial interests thereunder became, by virtue of the statute, immediately seized of legal estates of the same quality and duration. In order to prevent wives from taking both the jointures made for their benefit, in lieu of dower, and also dower in their husbands' property, which result would otherwise follow because of the husband's seizin acquired through the statute, it was enacted by the statute that upon making such an estate in jointure to the wife before marriage, she shall be forever barred of her dower, provided the estate in jointure would take effect immediately on the death of the husband, and was an estate for her own life at least, conveyed to herself, or to herself and husband jointly, and not in trust for her, and provided

further that the conveyance was expressly in lieu of dower.¹ If the jointure failed to come up to the statutory requirements, but was nevertheless a suitable and proper provision for the wife accepted by her in lieu of dower, it was given effect in equity as a bar to her dower by way of specific enforcement of her contract, and was termed an equitable jointure.² Where the jointure was made after marriage and during coverture, it did not bar the wife's dower right absolutely; it merely put her to her election as to whether she should take dower or the jointure in lieu thereof.³

§ 115. Jointures and Agreements Barring Dower in the United States.—The law of jointures is embodied in statutes in most of the states.⁴ By the terms of these statutes it is generally provided that a conveyance of real property to a person and his intended wife, or to the wife alone, or in trust for her, for the purpose of creating a jointure for her and with her assent, bars her dower right absolutely; and that any pecuniary provision made for the benefit of the intended wife, and in lieu of dower, if assented to by her, will also bar her dower. It is frequently provided fur-

mitting the determination of the respective property rights of the parties in the decree of limited divorce. See, also, to same effect, *Stewart v. Stewart*, 43 Ga. 294; *McKean v. Ferguson*, 51 Oh. St. 207.

1. 2 Bl. Com. 137-138.

2. 2 Scribner, *Dower*, 208 *et seq.*; *Williams R. P.* 235; *Drury v. Drury*, 2 Eden. 39; *Caruthers v. Caruthers*, 4 Brown Ch. 500; *McCartee v. Teller*, 8 Wend. (N. Y.) 267.

Where the intended wife was an infant such equitable jointure would be enforced if the provision for her benefit in lieu of dower was sufficient and certain, and was assented to by her parent or guardian. See cases and authorities above cited.

3. Co. Litt. 36b; 2 Bl. Com. 138; *Vernon's Case*, 4 Coke 1; *McCartee v. Teller*, 8 Wend. (N. Y.) 267.

4. N. Y. R. P. Law, §§ 197-202 inclusive; 1 Stim. Am. St. L. §§ 3241, 3242, 3243; *Graham v. Graham*, 67 Hun (N. Y.) 329, aff. 143 N. Y. 573; *McCartee v. Teller*, 8 Wend. (N. Y.) 267; *Vincent v. Spooner*, 2 Cush. (Mass.) 467; *Andrews v. Andrews*, 8 Conn. 79; *Carter's App.*, 59 Conn. 576; *McGee v. McGee*, 91 Ill. 548; *Grogan v. Garrison*, 27 Oh. St. 50; *In re Pulling*, 93 Mich. 274; *Pepper v. Thomas*, 85 Ky. 539; *Bryan v. Bryan*, 62 Ark. 79; *Fellers v. Fellers*, 54 Neb. 694; *Wentworth v. Wentworth*, 69 Me. 247

ther that such jointure or pecuniary provision made before the marriage without the wife's assent, or made after the marriage, shall put the wife to her election between such jointure or provision and dower. In New York she must elect by entering on the lands assigned for her dower or by starting an action therefor within a year from the death of her husband; otherwise she is deemed to have elected in favor of the jointure or pecuniary provision.⁵

In all states with statutes of this kind jointures or provisions made before marriage in accordance with their terms will, of course, bar dower at law as well as in equity.⁶ But apart from these statutes, the jurisdiction of equity over contracts gives to a court of equity the power to specifically enforce the performance of any valid contract made between a man and woman before marriage with reference to the marital rights of each in the property of the other, and if such contract is supported by a valid consideration, and has been made without fraud, and with full knowledge and understanding on the part of the wife of its terms and effect, equity will enforce it according to its terms. Therefore if the intended wife agrees, by such contract, not to claim dower, she will be barred therefrom.⁷ The burden,

5. See preceding note, also N. Y. R. P. L. §§ 199, 200, 201.

6. See note 4 preceding.

7. *Pierce v. Pierce*, 71 N. Y. 154; *Graham v. Graham*, 143 N. Y. 573; *Worrell v. Forsyth*, 141 Ill. 22; *Jacobs v. Jacobs*, 42 Iowa 600; *Freeland v. Freeland*, 128 Mass. 509; *In re Heald*, 22 N. H. 265; *Shoch v. Shoch*, 19 Pa. St. 252; *Shea v. Shea*, 121 Pa. St. 302; *In re Fennell's Estate*, 207 Pa. St. 309; *Brooks v. Austin*, 95 N. C. 474.

Where by the prenuptial contract the wife was to receive a certain piece of property in lieu of dower, and after the marriage the agreement was modified by substituting another piece of

land, which was executed in part by conveyance of the substituted parcel to a trustee, for the wife, it was held that the agreement as modified should stand under the circumstances, and dower was barred. *Worrell v. Forsyth*, 141 Ill. 22.

So, also, in *West v. Walker*, 77 Wis. 557, where there was a valid prenuptial contract barring dower, it was held that a further agreement made after marriage by which the provision for the wife was increased, was only a continuation of the prenuptial contract, not in discharge thereof, and therefore dower was barred.

before marriage

however, is upon those setting up such a contract to prove that it was secured from the intended wife without misrepresentation or concealment, with a full understanding on her part of its nature and effect.⁸ If the provision made for the intended wife in lieu of dower is inadequate, and the contract from her standpoint is unfair and inequitable, the court will not enforce it.⁹ These cases of pre-nuptial contracts seem to be only cases of equitable jointures, discussed in the preceding section.

Where provision is made by way of jointure after marriage, the wife is put to her election, on the death of her husband, between the jointure and dower. Her dower is not absolutely barred, since she cannot release dower to her husband.¹⁰ If she has received and used up the amount paid her in lieu of her dower before her husband's death, she is not barred from claiming dower, as her election during coverture does not bind her.¹¹ If the provision in lands, money or income is held by her on her husband's death, she must give it up before she can have dower assigned to her.¹²

8. *Pierce v. Pierce*, 71 N. Y. 154; *Graham v. Graham*, 143 N. Y. 573; *Shea v. Shea*, 121 Pa. St. 302; *Taylor v. Taylor*, 144 Ill. 436; *Fisher v. Koontz*, 110 Iowa 498; *Cummings v. Cummings*, 25 R. I. 528.

9. *Curry v. Curry*, 10 Hun (N. Y.) 366, and cases in preceding note.

10. *Jones v. Fleming*, 104 N. Y. 418; *Woods v. Woods*, 77 Me. 434; *Spangler v. Dukes*, 39 Oh. St. 642; *Pinkham v. Pinkham*, 95 Me. 71, holding that the same rule applies to the estate given by Stat. (ch. 157, L. 1895), instead of dower, which is abolished by that statute. Wife is put to her election between the provision by way of jointure and the statutory estate created to take the place of dower; *Kreiser's App.* 69 Pa. St. 194; *Butts v. Trice*, 69 Ga. 74;

Martin v. Martin, 22 Ala. 86; *Roberts v. Walker*, 82 Mo. 200.

In Michigan it is held that the Married Woman's Acts impliedly give the wife power to release dower to her husband during coverture. *Rhoades v. Davis*, 51 Mich. 306; *Dakin v. Dakin*, 97 Mich. 284; *Chittock v. Chittock*, 101 Mich. 367.

11. *Land v. Shipp*, 98 Va. 284.

12. *Kreiser's App.*, 69 Pa. St. 194; *Pinkham v. Pinkham*, 95 Me. 77, and cases in last two notes preceding.

These cases hold that an election made by the wife during coverture does not bind her. If after her husband's death she accepts the jointure, that constitutes an election and she is barred of dower. *Roberts v. Walker*, 82 Mo. 200.

In Iowa and Oregon, by statute, any

This is true irrespective of statutory provision, as it would be manifestly inequitable to let her take dower and also hold the provision made to take its place.

If a jointure fails, as where it develops that the husband was not the owner of the property given by way of jointure, or his estate is not sufficient to make good the pecuniary provision made therein, the wife's dower right arises again, at least to the extent of the failure of the jointure.¹³

§ 116. Testamentary Provisions in Lieu of Dower.—If a husband devise or bequeath property, real or personal, to his wife, expressly providing by his will that such testamentary provision shall be in lieu of dower, the wife must elect between the two; she will not be permitted to take both. By accepting the provisions of the will she accepts the condition thereto attached, and therefore gives up all claim to dower in her husband's estate, irrespective of the value of such provision as compared with her dower.¹

Where there is no express provision in the will to the effect that the legacy or devise in favor of the wife is in lieu of dower, she will, generally speaking, be entitled to both the testamentary provision and dower. She is put to her election only when the provisions of the will and her

agreement to release dower during the marriage is void for any purpose, and therefore the acceptance of such provisions does not bar dower. *Garner v. Fry*, 104 Iowa, 515 at 518; *House v. Fowle*, 20 Oreg. 163.

13. 2 Scribner, *Dower*, 432 *et seq.*; *Drury v. Drury*, 2 Eden 39; Statute of Uses so provided, 27 Henry VIII, c. 10, § 7. For statutes in U. S. on this point, see 1 Stim. Am. St. L. § 3247. See, also, *Hastings v. Dickinson*, 7 Mass. 153; *Grider v. Eubanks*, 12 Bush. (Ky.) 510.

In *Freeland v. Freeland*, 128 Mass. 509, it was held that dower was

barred, though husband's estate was not sufficient to pay her \$1500, which by the terms of the prenuptial agreement was to be charged as a debt against his estate. This was because she received the other benefits provided for, and as this payment was, by the terms of the agreement to be charged as a debt against his estate, it appeared that the wife took the chance of its collection, and so understood the matter.

1. *Van Orden v. Van Orden*, 10 Johns. (N. Y.) 30. See, also, cases in notes which follow, sustaining this general proposition.

dower cannot stand together. If it is possible for them to stand together she may take both. In the absence of positive evidence to the contrary the presumption is irresistible that the husband intends a provision for his wife to take effect as a testamentary gift, as though made to anyone else, not as an offer to buy a release of the dower which the law gives her.²

It is immaterial whether the provision in lieu of dower is greater or less in value than the dower right. If it can stand with dower the widow takes both.³ If real estate be devised to the wife in fee, it does not interfere with her dower in other real property of which the husband was seized during coverture, since dower may stand together with such devise. As to the land devised to her, of course her dower therein merges with the fee, but as to the other real property of the husband, her dower right is not affected. There is no release of dower to be implied from the acceptance of such a devise by her.⁴ For the same reason, where the will gives the wife a life estate in a part or all of the husband's real property, her dower right is not affected except as it merges with the life estate created by will. If such life estate be limited to her during widowhood or upon any limitation or condition which may bring it to an end before her death, it is subject to her right to a life estate in one-third of the same property, viz.: to her

2. *Birmingham v. Kirwan*, 2 Schoaies & Lef. 444; *Matter of Gordon*, 172 N. Y. 25; *Bennett v. Packer*, 70 Conn. 357; *Cunningham's Estate*, 137 Pa. St. 621; *In re Gotrean's Estate*, 34 Minn. 159, and cases on specific points in following notes. For statutes expressing this rule, see 1 Stim. Am. St. L. § 3244.

3. *Jackson v. Churchill*, 7 Cow. (N. Y.) 287; *Matter of Gordon*, 172 N. Y. 25; *Evans v. Webb*, 1 Yeates (Pa.) 424; *Cunningham's Estate*, 137 Pa. St. 621.

In White v. White, 16 N. J. L. 202, the widow was given one room in the dwelling house of her husband for her life, and a comfortable living out of his property, and subject thereto his lands, etc., were devised to his sons. This provisions was held to be consistent with dower.

4. *Lawrence v. Lawrence*, 2 Vern. 365; *Jackson v. Churchill*, 7 Cow. 287; *Lefevre v. Lefevre*, 59 N. Y. 434, and cases in following note.

dower right, and on the termination of the life estate by her remarriage or on the happening of the contingency on which it was limited, she is entitled to her dower in the same property.⁵ The point is that the devise to her, like a devise to any one else, is a devise of the interest which the husband had, subject to her dower right, unless the two estates or rights are necessarily repugnant to each other; and it would seem to be clear that they are not so repugnant in the case referred to, since there is no reason why the widow cannot hold a life estate in the entire property subject to her right of dower, any more than where such life estate is held by any third party. It has been held to the contrary, however, in New Jersey.⁶

The giving to the wife of an annuity or legacy charged by the will on the testator's real estate, is not repugnant to dower, as the devisee or heir takes the property subject to dower and also subject to the charge. Therefore, in the absence of an express provision making the devise or legacy in lieu of dower, the widow is not put to her election but may take both.⁷ Even the creation by will of a trust in all the husband's property, title thereto being vested in a trustee for the benefit of the wife and children or others does not force the wife to elect, since in the usual case there is nothing to prevent the trustees from holding such property subject to dower; and the same result follows where the trustee is given a power to sell or mortgage the property, since such conveyance or mortgage may well be made subject to dower.⁸ Where, however, the trustee is directed to care for the property, pay the taxes and interest on mort-

5. *Lewis v. Smith*, 9 N. Y. 502; *Lefevre v. Lefevre*, 59 N. Y. 434; *Bull v. Church*, 5 Hill (N. Y.) 206; *Matter of Franke*, 97 Iowa 704.

6. In New Jersey it is held that such life estate is inconsistent with dower in the same property, and the widow is put to her election. *Stark v. Hunton*, 1 N. J. Eq. 216; *Colgate's*

Ex'r v. Colgate, 23 N. J. Eq. 372.

7. *Horstmann v. Flege*, 172 N. Y. 381; *Adsit v. Adsit*, 2 Johns. Ch. 448; *Birmingham v. Kirwan*, 2 Schoales & Lef. 444.

8. *Wood v. Wood*, 5 Paige (N. Y.) 596; *Konvalinka v. Schlegel*, 104 N. Y. 125, and cases in following note.

gages, keep the premises in repair, and generally take care of the entire property, it is held that the trust is inconsistent with dower, since such provisions are necessarily inconsistent with setting off a life estate in one-third of the property to the widow, thereby giving her sole possession and control of that portion. If the widow is a beneficiary of such a trust she is put to her election.⁹

In Connecticut it has been held that where a trust was created for the benefit of the widow and children of the testator, and it appeared that the taking of dower by the widow would so reduce the estate that nothing would be left for the children at the expiration of the trust, the widow was put to her election, it appearing that dower was inconsistent with the purposes of the testator in creating the trust.¹⁰

In some states it is provided by statute that any provision of the husband's will in favor of the wife puts her to her election.¹¹

§ 117. Election by Widow.—In cases where the widow is put to her election she will be bound by an election actually made with knowledge of the extent and value of her husband's real estate in which she has dower and of the value of the testamentary provision in lieu thereof. An

9. *Matter of Gordon*, 172 N. Y. 25; *Tobias v. Ketcham*, 32 N. Y. 319; *Birmingham v. Kirwan*, 2 Schoales & L. 444.

It is submitted that there is no necessary inconsistency in these cases, since the husband might have intended that the trustees should so act subject to dower. But the husband's intent to put the wife to her election appears beyond a reasonable doubt, which is the true basis of the rule.

In *Colgate's Ex'r v. Colgate*, 23 N. J. Eq. 372, all the property of the

husband was to be sold, and one-half the proceeds was to form a fund, the income from which was to be paid the widow during her life. This was held to be inconsistent with dower and put the widow to her election.

10. *Alling v. Chatfield*, 42 Conn. 276.

11. *Buffington v. Bank*, 113 Mass. 246; *Milliken v. Welliver*, 37 Oh. St. 460; *Stone v. Vandermark*, 146 Ill. 312; *Bradford v. Kents*, 43 Pa. St. 474. For statute, see 1 Stim. Am. St. L. § 3244.

election made under a mistake of fact as to the value of either her dower or the testamentary provision will not bind her, and she may revoke it by returning what she has received by virtue of her election.¹ The time in which such election must be made is generally provided by statute.² The New York statute, providing that if she does not elect by entering after her dower has been assigned or by starting an action for her dower within a year from the death of her husband, she shall be deemed to have elected in favor of the testamentary provision in lieu thereof, is fairly typical of these statutes.³ Generally the actual taking possession of the property or receiving the money so devised or bequeathed in lieu of dower will amount to an election if made with full knowledge of the value and character of her husband's estate, though the mode of election is frequently provided for by statute.⁴ A valid election in favor of the testamentary provision where such election is required, ~~bars dower absolutely, not only as to the property of which the husband died seized, but also to property conveyed before his death subject to her dower right.~~⁵

1. *Macknet v. Macknet*, 29 N. J. Eq. 54; *Stone v. Vandermark*, 146 Ill. 312; *Anderson's Appeal*, 36 Pa. St. 476; *Milliken v. Welliver*, 37 Oh. St. 460; *Dabney v. Bailey*, 42 Ga. 521; *Steele v. Steele's Admr.*, 64 Ala. 438.

2. 1 Stim. Am. St. L., §§ 3265, 3266; 2 Scrib. Dower, 505.

3. N. Y. Real P. Law, §§ 200, 201.

In Alabama the widow must dissent in writing to a legacy in lieu of dower within a year from the probate of the will. *Steele v. Steele*, 64 Ala. 438. In Ohio the widow must elect within a year after service of citation upon her citing her to appear and make election. *Milliken v. Welliver*, 37 Oh. St. 460. In Illinois she must elect within a year from date of let-

ters of administration, § 10, Dower Act.

See, also, *Reed v. Dickerman*, 12 Pick. 146.

4. *Van Orden v. Van Orden*, 10 Johns (N. Y.) 30; *Bradforde v. Kents*, 43 Pa. St. 474; *Thompson v. Hoop*, 6 Oh. St. 480.

For statutes fixing modes of election, see 1 Stim. Am. St. L., § 3267.

5. *Steele v. Fisher*, 1 Edw. Ch. (N. Y.) 435; *Haynie v. Dickens*, 68 Ill. 267; *Buffington v. Bank*, 113 Mass. 246; *Allen v. Pray*, 12 Me. 138; *Hornsey v. Casey*, 21 Mo. 545; *Chapin v. Hill*, 1 R. I. 446; *Fairchild v. Marshall*, 42 Minn. 14.

In Michigan the court construed the statute as referring to lands of which the husband was seized at the

When the wife elects in favor of the testamentary provision, she takes it subject to the payment of debts of the husband, provided there is not sufficient other property to pay his debts, but she is entitled to receive such testamentary provision ahead of any other legatees named in the will. This is because she is not in the position of a recipient of the husband's bounty, like the others, but of one who has released or given up a valuable property right in consideration of the provision of the will in her favor.⁶

G.—Dower After Death of Husband.

§ 118. **Consummate Dower.**— On the death of the husband the wife's dower right becomes consummate; it is no longer the uncertain, indefinite, anomalous kind of interest which it was during its inchoate state, nor, on the other hand, is it an actual life estate before actual assignment. It is a right of action in the widow against the heir or devisee or grantee of the husband, as the case may be, to have her dower set off.⁷ As, before admeasurement, her dower is a mere chose in action, it cannot be assigned or mortgaged at law;⁸ but in equity such assignments or mortgages are recognized and enforced. Therefore under the merged procedure in law and equity prevailing in New York and other states, transfers and mortgages of the consummate right of dower are generally treated as valid and enforced no matter in what court the question arises.⁹ Be-

time of his death. and for that reason the widow's dower right in lands sold by the husband is not affected by her election. *Westbrook v. Vanderburgh*, 36 Mich. 30.

6. *Isenhardt v. Brown*, 1 Edw. Ch. (N. Y.) 411; *Bray v. Neill's Executrix*, 21 N. J. Eq. 343; *Steele v. Steele's Admr.*, 64 Ala. 438; *Lord v. Lord*, 23 Conn. 327; *Security Co. v. Bryant*, 52 Conn. 311; *Taylor's Estate*, 175 Pa. St. 60; *Borden v.*

Jenks, 140 Mass. 562; *Moore v. Alden*, 80 Me. 301.

7. 2 *Scribner, Dower*, 27; *Shepard v. Manhattan El. R. Co.*, 117 N. Y. 442; *Thompkins v. Fonda*, 4 Paige (N. Y.) 448; *Wade v. Miller*, 32 N. J. L. 296; *Rayner v. Lee*, 20 Mich. 384.

8. 2 *Scribner, Dower* 42; *Hart v. Burch*, 130 Ill. 426; *Johnson v. Shields*, 32 Me. 424.

9. *Payne v. Becker*, 87 N. Y. 153;

cause of its nature, as above explained, consummate dower cannot be reached by execution on judgments against the widow, though it may be reached by a creditor's bill in equity or by supplementary proceedings, a receiver being appointed by the court to bring an action for the admeasurement of her dower, after the assignment of which the life estate may be sold and the proceeds used to satisfy the judgment.¹⁰

§ 119. **Assignment of Dower.**—Dower must be assigned by metes and bounds if it can be done as a practical matter and without serious injustice to the widow or those interested in the land.¹ Where setting it off by metes and bounds is not practicable or would be clearly inequitable, dower will be assigned in some other way, either by giving to the widow a share of the rents and profits, or the final judgment may direct that one-third of the rental value of the property in question be paid to the widow during her life.² In New York it is provided that in such case such sum shall be a charge upon the property during the life of the wife.³

Where the husband was seized as tenant in common, the widow is entitled to a life estate in one-third of her husband's interest, therefore when dower is set off to her she

Mut. Life Ins. Co. v. Shipman, 119 N. Y. 324; Strong v. Clem, 12 Ind. 27; Dobberstein v. Murphy, 64 Minn. 127. The assignee may sue, in his own name by virtue of express statutory provision in New York and many of the states. See above cases.

10. *Tompkins v. Fonda*, 4 Paige (N. Y.) 448; *Aikman v. Harsell*, 98 N. Y. 186; *Payne v. Becker*, 87 N. Y. 153; *McMahon v. Gray*, 150 Mass. 251; *Petefish v. Buck*, 56 Ill. App. 149.

In *Harper v. Clayton*, 84 Md. 346, the court held not only that consummate dower could not be reached

at law, but that a court of equity would not lend its aid to enable a creditor of the widow to reach it in equity.

1. 2 *Scribner Dower*, 80; *Smith v. Smith*, 6 Lans. (N. Y.) 313; *Pierce v. Williams*, 3 N. J. L. 281; *Schnebly v. Schnebly*, 26 Ill. 116; *Austin v. Austin*, 50 Me. 74; *Sanders v. McMillan*, 98 Ala. 144.

2. N. Y. Code Civ. Pro., § 1613; *Coates v. Cheever*, 1 Cow. 460; *Lenfers v. Henke*, 73 Ill. 405, 411; *Atkin v. Merrill*, 39 Ill. 62.

3. N. Y. Code Civ. Pro., § 1613.

is entitled to occupy and enjoy the premises as tenant in common only, her undivided interest being one-third of the interest that her husband had.⁴

In the absence of mutual agreement between the parties concerned, or of statutes providing otherwise, dower must be set out in each parcel to which the dower right has attached; it cannot be confined to a single parcel, even though the value of the land set off is equal in value to dower in all the parcels subject to dower.⁵ In New York, if the widow consents, a distinct parcel, equal in value to her dower, may be set off to her in fee simple in satisfaction of her dower in all her husband's property.⁶ Provisions more or less similar may be found in the statutes of other states.⁷

Where real property is sold in an action of partition, the widow's right of dower attaches to the net proceeds, and either a gross sum will be paid to her, if she consents, or one-third thereof will be invested and the income paid to her during her life.⁸

The right of the parties interested to agree upon a gross sum to be paid to the widow for her dower is generally recognized and is provided for by the statutes in many states. In the absence of such agreement, however, the widow cannot be compelled to receive any such gross sum for her dower.⁹

4. *Smith v. Smith*, 6 *Lans.* (N. Y.) 313; *Osborne v. Rogers*, 19 *N. J. Eq.* 429; *Hart v. Burch*, 130 *Ill.* 426; *French v. Lord*, 69 *Me.* 537; *Blossom v. Blossom*, 91 *Mass.* 254.

5. 2 *Scribner Dower*, 587; *Sip v. Lawback*, 17 *N. J. L.* 442; *Schnebly v. Schnebly*, 26 *Ill.* 116; *Compton v. Pruitt*, 88 *Ind.* 171; *Skolfield v. Skolfield*, 88 *Me.* 258.

6. *N. Y. Code Civ. Pro.*, § 1620.

7. See 1 *Stim. Am. St. L.*, § 3277, and statutes on dower in the different states.

8. *N. Y. Code Civ. Pro.*, § 1569.

See, also, § 1567. The same rule applies where the land is sold to pay the husband's debts. *Higbee v. Westlake*, 14 *N. Y.* 281. See, also, for statutes in other states, 1 *Stim. Am. St. L.*, §§ 3216, 3276(2). As to dower in surplus money after foreclosure of mortgage, see § 98, note 12, *ante*.

9. *N. Y. Code Civ. Pro.*, § 1617. In such case, if dower cannot be admeasured by metes and bounds, the property may be sold. See § 1619. *Robinson v. Govers*, 138 *N. Y.* 425; *Atkin v. Merrill*, 39 *Ill.* 62.

The statute of limitations upon the action for dower is generally for the same period as provided for actions of ejectment.¹⁰

§ 120. Dower in Improvements Made by Heir or Grantee of Husband.—If the heir or devisee of the husband enters on the property, and improves it by erecting buildings or otherwise, and fails to set off dower for the widow, when dower is finally assigned she will be entitled to her life estate in the property as it is at the time of assignment, no allowance being made on account of the improvements for the benefit of the heir or devisee, it being his own fault that her dower was not assigned before the improvements were made.¹ This rule has been changed by statute in New York, but continues to be the law in the absence of statutory change.²

Where land was conveyed by the husband subject to his wife's dower right, the general rule is that the widow is entitled to have her dower set off to her in the property based on its value at the time of admeasurement, deducting, however, the additional value of the property due to improvements made by the husband's grantee. She is entitled

See, also, Stim. Am. St. L., § 3276(5)(7). affect the wife's dower right. See above cases.

10. In New York, the action for dower is barred if not brought within 20 years. Code Civ. Pro., § 1596. On this question see *Hastings v. Mace*, 157 Mass. 499; *Winters v. DeTurk*, 133 Pa. St. 359; *Whiting v. Nicholl*, 46 Ill. 230; *Taylor v. Lawrence*, 148 Ill. 388; *Thompson v. McCorkle*, 135 Ind. 484; *Lucas v. White*, 120 Iowa, 755; *Dunham v. Angier*, 20 Me. 242. In all cases the statute begins to run on the husband's death. Adverse possession before that time does not

For statutory provisions covering the action for dower in New York, see Code Civ. Pro., §§ 1596-1625, inc.

1. Co. Litt. 32a; *Doe v. Gwinnel*, 1 Q. B. 682; *Catlin v. Ware*, 9 Mass. 218; *Tarrone v. Beam*, 10 Oh. 498; *Humphrey v. Phinney*, 2 Johns (N. Y.) 484; *Allsmiller v. Freutchenicht*, 86 Ky. 198; *Ball v. Schaffer*, 14 Ill. App. 302, and cases cited in following notes.

2. N. Y. Code Civ. Pro., § 1609. As to similar statute in South Carolina, *Jefferies v. Allen*, 34 S. C. 189.

to dower in the property with all increase in value due to any cause whatever other than such improvements.³

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In New York and some other states it is settled that the widow is limited in every such case to the value of the property at the time her husband conveyed it, the reason given being that the increase in value apart from the improvement is due to the development of the property in the neighborhood, and the grantee of the husband has contributed his part to the general increase in values by the improvements on the land in question made by him.⁴ This reasoning would seem to fail in cases where the grantee has left the property unimproved, but where the value of the land has greatly increased through other causes. There seems to be no valid reason why the widow's right of dower should not grow in value with the property, excluding the value added by the improvements made by the husband's grantee.

§ 121. Dower After Assignment.— After dower is actually set off to the widow by metes and bounds and she has entered, she holds a life estate in the land so set off, which is subject to all the usual incidents of such estates as between herself and the remainderman or reversioner.⁵

3. *Scammon v. Campbell*, 75 Ill. 223; *Summers v. Babb*, 13 Ill. 483; *Davis v. Hutton*, 127 Ind. 481; *Quick v. Brenner*, 101 Ind. 230; *Pepper v. Thomas*, 85 Ky. 539; *Dockray v. Milliken*, 76 Me. 517; *Price v. Hobbs*, 47 Md. 359; *Young v. Thrasher*, 115 Mo. 222; *Butler v. Fitzgerald*, 43 Neb. 192; *Sanders v. McMillan*, 98 Ala. 144; *Thompson v. Morrow*, 5 Serg. & R. (Pa.) 289; *Wescott v. Campbell*, 11 R. I. 378.

In *Van Doren v. Van Doren*, 3 N. J. L. 270; *Cox v. Higsbee*, 11 N. J. L. 395; *Catlin v. Ware*, 9 Mass. 218 and *Stearns v. Swift*, 8 Pick. (Mass.) 532, the general rule that the value of

improvements should be deducted is stated. As to increase in value not due to improvements, the question is not considered or decided.

4. *Walker v. Schuyler*, 10 Wend. (N. Y.) 480; *Guerin v. Moore*, 25 Minn. 462. For statutes on this point see 1 Stim. Am. St. L., § 3279.

The widow takes dower subject to any decrease or impairment in value, irrespective of the cause thereof, in any of the cases above discussed. See cases cited in preceding notes.

5. 2 Scribner Dower, 781; *Lawrence v. Brown*, 5 N. Y. 394; *Linden v. Graham*, 34 Barb. (N. Y.) 316; *Jonas v. Hunt*, 40 N. J. Eq. 660;

§ 122. Widow's Quarantine.—The right of quarantine at common law is the right of the widow to remain forty days in the principal mansion house or residence of her husband, within which period dower might be assigned. It was originally provided for by Magna Charta. It is not a term of years, nor an estate, but a privilege of occupation given by law to the widow to provide for her during the period immediately following her husband's death, bridging over the interval until dower may be assigned.⁶ In New York and many of the states the widow's quarantine is provided for by statute substantially as at common law, it being generally provided that in addition to occupying the principal residence of her husband, she shall have her reasonable sustenance from his estate during the forty days following his death.⁷

In some states the period during which she may so hold possession is a year, and in other states it is provided that she shall have this right until dower is actually assigned.⁸

Since the right of quarantine is a mere personal privilege, and does not amount to an estate, either for the period provided for by the statute, or for life in cases where the right is to continue until the assignment of dower, it follows that none of the incidents of such estates attach to it. The widow is not required to pay taxes or make repairs or meet any of the charges incident to the carrying of the property,⁹ nor is her interest subject to sale on execution.¹⁰

Peyton v. Jefferies, 50 Ill. 143; McMahon v. Gray, 150 Mass. 289; Hodge v. Phinney, 106 Mich. 537. See, also, Chapter VI, *post*, Incidents of Life Estates.

6. Co. Litt. 34b; 2 Bl. Com. 139; 2 Scribner Dower, 55.

7. N. Y. Real Prop. Law, § 204; 1 Stim. Am. St. L., § 3278.

8. 1 Stim. Am. St. L., § 3278; Spinning v. Spinning, 43 N. J. Eq. 215.

9. Harrison v. Peck, 56 Barb. (N. Y.) 251; Spinning v. Spinning, 43 N. J. Eq. 215; Graves v. Cochran, 68 Mo. 74.

10. Carnall v. Wilson, 21 Ark. 62.

CHAPTER V.

ESTATES BY THE MARITAL RIGHT AND CURTESY.

§ 123. **Estate by the Marital Right.**— At common law the husband was entitled to the rents and profits, use and enjoyment of all the real property of which his wife was seised in freehold at the time of the marriage, and of all of which she might subsequently become seised during the marriage. This estate by the marital right was a freehold, measured by the joint lives of husband and wife; if the husband died first, the wife became the sole owner as before the marriage; if the wife died first her heirs became immediately entitled to the property, free of any claim of the husband, unless he had acquired an estate of curtesy through the birth of issue.¹ As we shall see, the estate by the marital right was changed, by the birth of issue to the marriage, into a life estate in the husband, measured by his own life, which was not subject to be defeated by the death of the wife.²

The estate by the marital right, being a freehold estate in the husband measured by the joint lives of husband and wife, could be conveyed by him without the consent or concurrence of the wife, and his grantee acquired all of his rights in the property.³ Since the husband could con-

1. Co. Litt. 351a; 2 Kent Com. 130; Jones v. Patterson, 11 Barb. (N. Y.) 572; Babb v. Perley, 1 Me. 6; Payne v. Parker, 10 Me. 178; Van Note v. Downey, 28 N. J. L. 219; Shallenberger v. Ashworth, 25 Pa. St. 152; Junction R. Co. v. Harris, 9 Ind. 184; Mut. L. Ins. Co. v. Deale, 18 Md. 26; Clapp v. Stoughton, 10 Pick. (Mass.) 463 (holding that if husband does not receive rents and profits during his life, his representative and not his wife is entitled to

them); Shaw v. Partridge, 17 Vt. 626.

After the wife's death the husband is entitled to ungathered crops planted or sowed by him, as emblements. Bennett v. Bennett, 34 Ala. 53.

2. See § 124, *post*.

3. Co. Litt. 325b; Trask v. Patterson, 29 Me. 499; Eaton v. Whittaker, 18 Conn. 222; Allen v. Hooper, 50 Me. 371, 379; Flagg v. Bean, 25 N. H. 49; Mellus v. Snowman, 21 Me. 201, and cases in note 1 preceding.

vey it, creditors of the husband could levy upon it and sell it for his debts.⁴ In any case where this estate was transferred the purchaser thereof got only the husband's interest, viz.: the right to the rents and profits, use and enjoyment of the property in question during the joint lives of the husband and wife, such estate coming absolutely to an end on the death of either of them.

Though the husband was the owner of a distinct freehold estate, nevertheless his seisin was "in right of the wife," and they were regarded as jointly seised. Therefore, if they were disseised or ousted wrongfully, the adverse possession of the wrongdoer ran against them both so as to bar the wife as well as the husband if continued for the period provided for by the Statute of Limitations. For the same reason actions based on injuries to the land of a permanent nature could be maintained only in the names of both of them jointly,⁵ while actions for injuries of a temporary kind could be maintained by the husband alone, since the injury was to his present estate only.⁶

Leasehold interests of the wife could be reduced to possession by the husband only by selling or assigning them. He was entitled to the possession and enjoyment of such leasehold properties during his wife's life, and on her death, if he survived, they became his property absolutely, like her other personal property; if she survived him they became her property again, in which event a bequest of such leasehold interests by the husband would be void. The husband, however, could reduce them to possession by selling

4. *Rabb v. Perley*, 1 Me. 6; *Beale v. Knowles*, 45 Me. 479; *Litchfield v. Cudworth*, 15 Pick. (Mass.) 23; *Nicholls v. O'Neill*, 10 N. J. Eq. 88.

5. *Coe v. Wolcottville Mfg. Co.*, 35 Conn. 175; *Melvin v. Props. Merrimac R. Locks, &c.*, 16 Pick. (Mass.) 161; *Mellus v. Snowman*, 21 Me. 201 (in which case the husband sold his estate

by the marital right in land inherited by his wife, the court holding that the possession of the purchaser was not adverse to the wife, since she could not interfere with his possession till after her husband's death).

6. *Nicholls v. O'Neill*, 10 N. J. Eq. 88; *Wyatt v. Simpson*, 8 W. Va. 394, and cases in preceding note.

and assigning them, the proceeds of such sale being his property absolutely.⁷

The married women's property acts, which have been enacted in England and the different states, have done away with this estate by the marital right. Generally speaking, a married woman is now entitled to the use and enjoyment of her property as though unmarried, free and clear of any claim on the part of the husband, except in-so-far as his right of curtesy may affect her interest. The effect of these statutes will be considered further in connection with curtesy.⁸

§ 124. Nature of Curtesy.—Curtesy, whether initiate or consummate, is a life estate in the husband, measured by his own life, in all the real property of which his wife was seised of an estate of inheritance during coverture, provided there is a valid marriage between the parties and that issue has been born to the marriage who may inherit the property in which curtesy is claimed. As soon as issue is born the husband's estate by the marital right is changed into this estate of curtesy. It is called curtesy initiate during the life of the wife, and differs radically from inchoate dower, in that it extends to all the real property of which the wife was seised of an estate of inheritance during the marriage, and in that it is a vested freehold estate measured by the husband's life, and in no way affected by her death.¹

7. Co. Litt. 46b, 351a.; 2 Bl. Com. 434; Riley v. Riley, 19 N. J. Eq. 229; *In Re Bellamy*, 25 Ch. Div. 620; Allen v. Hooper, 50 Me. 371, 374. The husband became the absolute owner of his wife's chattels; he had the right to "reduce to possession her choses in action by collecting them, and on doing so the sums collected became his absolutely."

Divorce, terminating the marital relation, necessarily brings to an end

the estate by the marital right Wright v. Wright, 2 Md. 429; Barber v. Root, 10 Mass. 260; *Mattocks v. Stearns*, 9 Vt. 326, dicta at p. 336.

8. See § 131, *post*, and notes thereunder.

1. 2 Bl. Com. 127, 128; Foster v. Marshall, 22 N. H. 491; Collins v. Russell, 184 N. Y. 74; Jackson v. Jackson, 144 Ill. 274, and cases cited in notes which follow.

After the wife's death the estate is called curtesy consummate; it differs in no material respect from curtesy initiate, being nothing more or less than a continuance of the life estate which vests in the husband on the concurrence of seisin and the birth of issue. As we have seen, in the case of the estate by the marital right, husband and wife are jointly seised, the husband in right of his wife, so that the adverse possession of a disseisor, if continued for the period provided by the Statute of Limitations, will run against the wife as well as the husband, and bar her right of entry.² But in the case of curtesy, the wife has only a reversionary interest depending upon the life estate of the husband. She, therefore, has no right of entry during her husband's life, and the period of adverse holding in the case above mentioned does not begin to run against her till after her right of entry accrues on her husband's death.³

§ 125. Requisites of Curtesy; Valid Marriage.—As in the case of dower there must be a valid marriage in order that curtesy may arise, since the estate, like dower, arises by

2. See preceding section and notes 5 and 6 thereunder.

3. *Foster v. Marshall*, 22 N. H. 481; *Shortall v. Hinckley*, 31 Ill. 219; *Crow v. Kightlinger*, 35 Pa. St. 343; *Dawson v. Edwards*, 189 Ill. 60.

Courts and text writers speak of curtesy consummate as differing essentially from curtesy initiate, but it is submitted that no essential difference exists, all the incidents of a life estate for the husband's own life existing in an estate of curtesy initiate as in the case of an estate of curtesy consummate. Thus he may convey the estate before as well as after his wife's death. *Foster v. Marshall*, 22 N. H. 491; *Jackson v. Jackson*, 144 Ill. 274. Before as well as after his wife's death his estate may be sold on

execution by his creditors; *Van Duzer v. Van Duzer*, 6 Paige (N. Y.) 366; *Watson v. Watson*, 13 Conn. 83; *Bozart v. Sargent*, 128 Ill. 95; he may sue without joining his wife to recover the land from an adverse holder; *Shortall v. Hinckley*, 31 Ill. 219; he is entitled to emblements in both cases, and in both cases the estate is held subject to the limitation that no waste be committed. *Bennett v. Bennett*, 34 Ala. 53, holding that a husband having an estate by the marital right only is entitled to emblements; *Babb v. Perley*, 1 Me. 6, holding that an estate by the marital right when conveyed to a third person is held subject to the duty not to commit waste.

operation of law out of the marital relation. If the marriage is absolutely void no estate of curtesy arises. If the marriage is voidable curtesy arises subject to be defeated, like dower, by the annulment of the marriage by a court of competent jurisdiction. If such a marriage is not set aside up to the time of the wife's death, the husband's curtesy cannot thereafter be affected by any question as to the validity of the marriage.⁴

Divorce, bringing the marriage to an end, terminates curtesy unless there be express statutory provision preserving the husband's rights in case he secures the divorce against his wife for her misconduct.⁵

§ 126. Seisin of the Wife.—The wife must be seised of an estate of inheritance during coverture. The common law rule was that she must be actually seised—seisin at law was not sufficient—contrary to the rule in the case of dower. Seisin at law, as we have seen, exists where an heir or devisee becomes entitled to property by inheritance or by devise, but has not yet entered. An exception was made in the case of dower in order to prevent the husband from defeating his wife's dower right by refusing to make an entry in such case.⁶ The same reason for the exception does not exist in the case of curtesy, as the husband may, by entry, complete his wife's seisin, and if he fails to do so it is his own fault. Therefore in such case the wife must

4. See discussion of this topic in Chapter IV, on Dower, and cases there cited.

5. Pullen v. Pullen, 52 N. J. Eq. 9; Meacham v. Bunting, 156 Ill. 586; Wheeler v. Hotchkiss, 10 Conn. 225; Burgess v. Muldoon, 18 R. I. 607.

In Meacham v. Bunting, 156 Ill. 586, the court held that under a statute providing that divorce secured against a husband for his misconduct bars curtesy, if the husband

secured the divorce against his wife his curtesy would not be affected thereby, following the argument in Wait v. Wait, 4 N. Y. 95 (a dower case).

A divorce *a mensa et thoro*, or separation from bed and board by legal decree, has no effect on curtesy. Clark v. Clark, 6 Watts, & S. (Pa.) 85; Smoot v. Lecat, 1 Stew. 590.

6. See § 96, *ante*.

actually enter, or her husband must enter in her behalf, in order that curtesy may arise.⁷ The reason why actual seisin was necessary at common law was that the wife must be actually seised in order that the children of the marriage might inherit the land in question; if she died before entry on land inherited by her from an ancestor or devised to her by will, her heirs would not inherit, but the land would revert to the heirs of her ancestor or devisor. This technical rule has been generally abolished, both in England and the United States, including New York.⁸ Nevertheless in New York an actual entry by the wife is still required as a prerequisite of curtesy, though the reason therefor has long ceased to exist.⁹ In other states actual entry is not necessary. If the wife is the owner of an estate of inheritance which is not in the adverse possession of another during coverture, curtesy attaches.¹⁰ It has been held in a few states that seisin is entirely unnecessary, since seisin of the wife is no longer required in order that her heirs may inherit, and therefore that even though the property be in the adverse possession of another, curtesy attaches provided she have a present estate of inheritance in the land,¹¹ but the courts have not generally gone so far. The prevailing rule is that she must be seised in fact or in law in order to entitle her husband to curtesy.¹²

7. 2 Bl. Com. 127; *Adair v. Lott*, 3 Hill (N. Y.) 182; *Jackson v. Johnson*, 5 Cowen 74, 97; *Carr v. Anderson*, 6 App. Div. (N. Y.) 6, and cases cited in notes which follow.

8. Co. Litt. 40, a; 2 Bl. Com. 128; *Davis v. Mason*, 1 Pet. 507; *Lessee of Borland v. Marshall*, 2 Oh. St. 308; *Carr v. Anderson*, 6 App. Div. (N. Y.) 6.

9. *Carr v. Anderson*, 6 App. Div. (N. Y.) 6; *Adair v. Lott*, 3 Hill (N. Y.) 182. See dicta to same effect in *Collins v. Russell*, 184 N. Y. 74.

10. *Lessee of Borland v. Marshall*, 2 Oh. St. 308; *Mettler v. Miller*, 129 Ill. 630; *Chew v. Commr's, &c.*, 5 Rawle (Pa.) 160; *Dend. Hopper v. Demarest*, 21 N. J. L. 525; *Martin v. Trail*, 142 Mo. 85. See, also, Mass. Pub. Stat., ch. 173, § 3.

11. *Lessee of Borland v. Marshall*, 2 Oh. St. 308; *Kline v. Beebe*, 6 Conn. 494; *Stoolfors v. Jenkins*, 8 S. & R. (Pa.) 167.

12. See cases in note 10, *supra*, except *Borland v. Marshall*, which holds that curtesy attaches though seisin be prevented by adverse possession.

Where real property is conveyed by deed, either under the Statute of Uses or under the modern statutes, the delivery of the deed causes seisin to pass to the wife without entry, so that in such cases she becomes actually seised without entering or taking possession.¹³ So, also, where the property is in the possession of a tenant for years when she takes by will or inheritance, she is actually seised without entry, as the possession of the tenant is her possession for the purposes of seisin.¹⁴ Furthermore actual entry is not necessary in the case of wild and uncultivated lands; curtesy attaches though no entry be made by the wife.¹⁵ The possession of one tenant in common is the possession of the other, so that if one is in possession the other is seised though she may have made no entry, and her husband will be entitled to curtesy.¹⁶

As in the case of dower, ownership of a reversion or a remainder after a precedent life estate is not sufficient to entitle the husband to curtesy, since seisin is in the life tenant, not the wife, she having died before the death of the life tenant.¹⁷ But where a remainder is created after a

13. *Adair v. Lott*, 3 Hill (N. Y.) 182; *Jackson v. Johnson*, 5 Cowen 74, 97; *Carr v. Anderson*, 6 App. Div. (N. Y.) 6.

14. *DeGrey v. Richardson*, 3 Atk. 469; *Jackson v. Johnson*, 5 Cowen, 74, 97.

15. In such case, "the possession follows the title so as to enable the owner to maintain trespass, and, with equal reason, to sustain an estate by the curtesy." From opinion in *Jackson v. Johnson*, 5 Cowen (N. Y.) 74, at p. 97, referring to decision in *Jackson v. Sellick*, 8 Johns. (N. Y.) 270.

16. *Sterling v. Perlington*, 2 Equity Cas. Abr. 730.

17. This is true in all jurisdictions, even in those states where it is held

that adverse possession does not prevent curtesy from arising. *Collins v. Russell*, 184 N. Y. 74; *Shores v. Cady*, 8 Allen (Mass.) 425; *Todd v. Oviatt*, 58 Conn. 174; *Orford v. Benton*, 36 N. H. 395; *Watkins v. Thornton*, 11 Oh. St. 367.

Where land is devised to or inherited by a married woman subject to an outstanding right of dower, and she dies during the life of the tenant in dower, curtesy attaches to a two-thirds interest in the land, since she was seised of only a two-thirds interest. Even though dower had not actually been assigned until after the death of such married woman, nevertheless such assignment relates back to the death of the testator or ancestor, so that by relation the doweress

precedent tenancy for years, curtesy attaches to the remainder, since the possession of the tenant for years is the possession of the remainderman, who is thus actually seised.¹⁸

§ 127. Birth of Issue.— Issue must be born alive during the life of the mother, capable of inheriting the property in which curtesy is claimed. Evidence sufficient to establish that the child was alive when born will be enough to satisfy this requisite even though the child die immediately after birth.¹ If the mother dies in childbirth and the child is given birth through the Caesarean operation thereafter, curtesy does not arise, as the rights of her heirs attach immediately on her death, and curtesy must attach during her life.² The child or children must be capable of inheriting the property in question. If they take on the mother's death by purchase and not by descent, curtesy does not arise. For instance, where property was devised to the wife in fee, but in case of her death leaving issue the property should then go to such issue in fee, it was held that the children took by virtue of the will, as purchasers, and could not by any possibility take by inheritance from their mother as heirs, and therefore the husband of the devisee was not entitled to curtesy.³

is seised from that time, in that way preventing such married woman from being seised in the one-third part set off as dower. *Matter of Cregier*, 1 Barb. Ch. (N. Y.) 598; *Hitner v. Ege*, 23 Pa. St. 305; *Mettler v. Miller*, 129 Ill. 630.

18. 4 Kent Com. 29; *Taylor v. Gould*, 10 Barb. (N. Y.) 388; *Jackson v. Johnson*, 5 Cowen (N. Y.) 74; *Landon v. Townsend*, 129 N. Y. 166.

1. 2 Bl. Com. 128; Co. Litt. 29b; *Heath v. White*, 5 Conn. 228; *Jackson v. Johnson*, 5 Cowen (N. Y.) 74, at p. 95; *Cleghorn v. Burrows*, 2 Ch. 497; *Comer v. Chamberlain*, 6 Allen

(Mass.) 166. In *Hunter v. Whitworth*, 9 Ala. 965, the court held that curtesy attaches where the children were born before marriage but were legitimized by the subsequent marriage of their parents.

2. Co. Litt. 29b; 2 Bl. Com. 127; *Marsellis v. Thalhimier*, 2 Paige (N. Y.) 33, at p. 42; *Matter of Wynne*, 1 Lansing (N. Y.) 508, at p. 513.

3. *Barker v. Barker*, 2 Simons 249. The only other situation in which this question can arise is in the case of a fee tail special to a woman and her heirs by a certain husband, naming him. In such case if such

It is not necessary that these requisites should concur at the same time. If a child be born at any time during the marriage the husband's curtesy attaches to any property of which the wife was seised during coverture, and if after the death of the child the wife becomes seised of other property, curtesy attaches at once.⁴ All that is necessary is that at some time during the marriage the wife was seised, and that at any time during the marriage a child was born alive.

§ 128. Curtesy in Estates Tail, Conditional Fees, Estates Upon Limitation and Conditional Limitation.—Curtesy attaches to estates in fee tail exactly as does dower, and the termination of the estate tail on the death of the wife without issue surviving does not defeat her husband's curtesy.⁵ The doing away with estates tail by statute in most jurisdictions has made this rule of little practical importance at the present time.⁶ In the case of estates upon condition, limitation and conditional limitation the rules are the same as with dower; that is, the termination of an estate upon condition by enforcement of forfeiture for breach of condition, and the termination of estates upon limitation by the happening of the event on which the estate was limited, also brings to an end the husband's curtesy in such estate.⁷ But the termination of estates upon conditional limita-

husband dies and the wife, tenant in tail, marries again, her second husband is not entitled to curtesy in the land so held by his wife, since the issue of the marriage could not take it by inheritance. The doing away with estates tail in most jurisdictions has made the rule of little practical importance. Co. Litt. 29b; 2 Bl. Com. 128.

4. Co. Litt. 30a; *Corner v. Chamberlain*, 6 Allen (Mass.) 166; *Jackson v. Johnson*, 5 Cowen (N. Y.) 74, at p. 95; *Hunter v. Whitworth*, 9 Ala. 965.

In several states statutes have

been enacted doing away with the requisite of birth of issue. See *Dubs v. Dubs*, 31 Pa. St. 154; 2 Mich. Comp. L. Ch. 89, § 30; Ohio Rev. Stat. § 4176; Neb. Comp. Stat. Ch. 23, § 29.

5. *Holden v. Wells*, 18 R. I. 802; *May v. Mayer*, 8 Watts (Pa.) 203; 4 Kent's Com. 32.

6. See *Estates Tail*, *ante*.

7. 1 Scribner, *Dower*, 291; 4 Kent Com. 33; *Hatfield v. Sneden*, 54 N. Y. 280; *McMasters v. Negley*, 152 Pa. St. 303.

tion does not affect the husband's curtesy.⁸ What was ~~said in connection~~ with this subject in its application to dower applies with equal force to curtesy, and the cases there cited are equally in point on the above proposition.⁹

§ 129. **Curtesy in Equitable Estates.**—Equity follows the law in recognizing curtesy as an incident of trust estates in fee. If all the elements are present which would entitle the husband to curtesy in a similar legal estate, he is entitled to curtesy in the trust estates of his wife.¹ As was said in connection with the discussion of dower in trust estates,² there is no such thing as seisin in the owner of an equitable estate, seisin being in the trustee; but the ownership of such estate, carrying with it the right of enjoyment of the income therefrom through the trustee, is the equivalent in equity of seisin at law, sufficient to give rise to curtesy. If the wife is seised in that sense, and the further requisites of a valid marriage and the birth of issue are present, the right of curtesy attaches as in the case of legal estates.

If, however, the trust estate is given to the wife for her sole and separate use, to be held and enjoyed by her and her heirs free from any estate or interest in the husband, and therefore free from the estate of curtesy, curtesy does not arise therein, since it would be contrary to the express terms of the trust.³ But, in order that curtesy shall not arise the intention to exclude it must be clearly expressed in such case. Therefore, if the trust is for the sole and separate use of the wife, "separate and apart from her

8. *Buckworth v. Thirkell*, 3 Bos. & P. 652; *Hatfield v. Sneden*, 54 N. Y. 280; *McMasters v. Negley*, 152 Pa. St. 303; *Webster v. Ellsworth*, 147 Mass. 602.

9. § 106, *ante*.

1. *Cushing v. Blake*, 30 N. J. Eq. 689; *Ege v. Medler*, 82 Pa. St. 86;

Richardson v. Stodder, 100 Mass. 528; *Tillinghast v. Dailey*, 7 R. I. 383; *Luntz v. Greve*, 102 Ind. 173; *Meacham v. Bunting*, 156 Ill. 586.

2. § 99, *ante*.

3. *Ryler v. Cloud*, 14 Pa. St. 361; *Monroe v. Van Neter*, 100 Ill. 347, and cases in note 1 preceding.

husband," though the husband is excluded from curtesy in the land in question during her life he will nevertheless be entitled to curtesy on her death, the provision referred to excluding curtesy or the estate by the marital right, as the case may be, during her life only.⁴ Where a legal estate is conveyed to a wife for her sole and separate use, free from curtesy by the express terms of the deed, there is no question that at law such attempt to prevent curtesy from attaching would be void as an attempt to take away a legal incident of the estate. There is authority sustained by strong reasoning for the position that equity will not interfere in such case; that equity must recognize the rule at law and enforce it.⁵ The prevailing view, settled as law in most states where the question has arisen, however, is that curtesy will not arise as a beneficial right in such a case; that the husband takes the legal title as tenant in curtesy under the rule at law, but he takes it impressed with a trust in equity to hold it for the sole and separate use of the wife, her heirs or assigns, in accordance with the terms of the deed or will by which the wife took title.⁶

*Wife's
estate
taken
free
from
curtesy*

§ 130. Curtesy in Other Interests and Estates.—Mortgaged property is subject to curtesy, the husband's interest attaching to the property subject to the mortgage, or to the equity of redemption, of which his wife is seised. The same general rules exist as in the case of dower in mortgaged property: (a) where the wife takes title subject to a mortgage, and (b) gives back a purchase money mortgage

4. *Cushing v. Blake*, 30 N. J. Eq. 689; *Richardson v. Stodder*, 100 Mass. 528; *Ege v. Medlar*, 82 Pa. St. 86; *Tillinghast v. Dailey*, 7 R. I. 383; *Meacham v. Bunting*, 156 Ill. 586; *Luntz v. Greve*, 102 Ind. 173.

5. *Mullany v. Mullany*, 4 N. J. Eq. 16; *Ames Cas. Trusts*, 383, quoting *Lewis on Trusts*, 829.

6. *Fears v. Brooks*, 12 Ga. 195;

Pool v. Blakie, 53 Ill. 495; *Monroe v. Van Meter*, 100 Ill. 347; *McBreen v. McBreen*, 154 Mo. 323; *Haight v. Hall*, 74 Wis. 152. See, also, *Armstrong v. Rose*, 20 N. J. Eq. 109, dicta stating above rule, contra to *Mullany v. Mullany*, 4 N. J. Eq. 16; *Riley v. Riley*, 25 Conn. 154, dicta to same effect.

on taking title.⁷ As the wife could not convey or mortgage her property at common law without her husband joining therein, a deed or mortgage executed by her alone was void, and in no way affected her husband's curtesy.⁸

Curtesy does not attach to estates for life or estates *pur autre vie* for the same reasons that prevent dower from attaching to such interests, viz.: they are not estates of inheritance, and are not capable of being inherited as freehold estates by the children of the marriage.⁹

An estate in joint tenancy in the wife gives no estate of curtesy to the husband, since her interest is not one which will of necessity pass by inheritance to her children on her death intestate. If she should die before her co-tenant her interest passes by survivorship to such co-tenant.¹⁰ As in the case of dower, however, curtesy attaches to a tenancy in common, since the estate will pass by inheritance to the children of the marriage.¹¹

The husband of a mortgagee or trustee is not entitled to curtesy since his wife is not beneficially seised. The legal title vests in a mortgagee only by way of security for the mortgage debt, and as incident thereto, and in a trustee only for the purposes of administering the trust in favor of the beneficiaries who are the real owners of the property.¹²

Where land is taken under the power of eminent domain the husband's curtesy in the land ceases, but attaches to the proceeds awarded therefor.¹³

7. Hart v. Chase, 46 Conn. 207; De Camp v. Crane, 19 N. J. Eq. 166. See, also, § 97, *ante*, as to dower in mortgaged property, and § 98, *ante*, as to dower subject to purchase money mortgages.

8. Armstrong v. Rose, 20 N. J. Eq. 109; Middleton v. Stewart, 47 N. J. Eq. 293. For effect of married woman's acts, see § 131, *post*.

9. § 103, *ante*.

10. Co. Litt. 183a; § 101, *ante*, as to analogous case of dower.

11. Sterling v. Penlington, 2 Eq. Cas. Abr. 730; Wass v. Bucknam, 38 Me. 356; § 101, *ante*.

12. Chew v. Commr's, etc., 5 Rawle (Pa.) 160; Ames Cas. Trusts, 374, note; 4 Kent Com. 32. See § 100, note 10, *ante*.

13. *In re Camp*, 126 N. Y. 377; Houghton v. Hapgood, 13 Pick. 154.

§ 131. Curtesy as Affected by Married Woman's Acts.—

In England and in most if not all states, statutes have been enacted giving to married women control over their property, real and personal, and taking away from the husband the right to the possession and enjoyment of her land, the right to convey or encumber it in any way, and taking away the right of the husband's creditors to levy upon her property. In England, New York, Michigan, and some other states the wife is given the right to hold and enjoy, convey and devise her real property as though unmarried. In these jurisdictions it is held that curtesy initiate is done away with as a right, and is necessarily reduced to a mere status, like that of a presumptive heir, the husband being entitled to curtesy only in such real property of which the wife continues to be seised at the time of her death, not having disposed of it by will. Since she is given the right to enjoy, convey and devise her land as though unmarried, she may do so unaffected by curtesy. Therefore curtesy initiate does not exist, and curtesy arises for the first time on her death, but only in such land as she has not conveyed to others during her life or devised by will on her death. In other words a new requisite of curtesy is introduced—that the wife must die intestate as to the lands in question and seised thereof at the time of her death.¹

In New Jersey, Delaware, Virginia, Rhode Island and possibly some other states, the courts construe the married woman's acts in force in those states as giving to the wife the exclusive right to possess and enjoy her own land and the income therefrom, and the right to convey it during her life, and if such conveyance is made by her in legal form the husband's curtesy is defeated. In fact, in these states as in the first class of states above referred to, curtesy initiate is reduced from a life estate in the husband to a mere possibility similar to the possible right of a presump-

1. Hope v. Hope, 2 Ch. (Eng.) 336; Y. 71; Thurber v. Townsend, 22 N. Y. Hatfield v. Sneden, 54 N. Y. 280; Al- 516; Kingsley v. Smith, 14 Wis. 390; bany Co. Sav. B. v. McCarty, 149 N. Long v. Marvin, 15 Mich. 60.

tive heir. On the wife's death, however, curtesy attaches as at common law, unaffected by any will which she may have executed.² The same rule seems to prevail in Connecticut, though the effect of a conveyance by the wife is not clearly laid down in the cases.³ In New Jersey and Virginia and several other states the question is further complicated by statutes which require the husband to join with the wife in any conveyance of her realty, or to consent thereto in writing, otherwise the conveyance is void.⁴ It is clear, however, that these statutes do not save his curtesy initiate; they merely give him the power to prevent alienation by the wife so that she will continue seised of the land till her death when his curtesy attaches.

In Massachusetts the earlier statutes were construed as changing curtesy initiate into an inchoate interest in the husband, like inchoate dower, but extending to all of his wife's real property, and ripening into a life estate therein on her death, which interest, like dower, remained unaffected by any conveyance or devise made by the wife. The later statutes have reduced curtesy to a life estate in one-third of the wife's realty only, and have made it exactly the same as dower, though the term, curtesy, is still applied to it.⁵ In Illinois, Ohio, and possibly some other states, curtesy as such has been expressly abolished and in lieu thereof the husband is given dower in his wife's real property, exactly as she is given dower in his real property,

2. *Porch v. Fries*, 18 N. J. Eq. 204; *Middleton v. Stewart*, 47 N. J. Eq. 293; *Matter of Folwell*, 67 N. J. Eq. 570, 574; *Moore v. Darby*, 6 Del. Ch. 193; *Breeding v. Davis*, 77 Va. 639. R. I. Gen. Laws (1909), p. 883, § 12.

3. *Sill v. White*, 62 Conn. 430 (holding that a devise made by wife in no way affected curtesy); *Plumb v. Sawyer*, 21 Conn. 351.

4. *Porch v. Fries*, 18 N. J. Eq. 204; *Middleton v. Stewart*, 47 N. J.

Eq. 293; *Moore v. Darby*, 6 Del. Ch. 193; *Breeding v. Davis*, 77 Va. 639; *Cook v. Walling*, 117 Ind. 9; *Cole v. Van Riper*, 44 Ill. 58.

5. *Doyle v. Am. Fire Ins. Co.*, 181 Mass. 139, holding that such inchoate curtesy is an insurable interest before and after the Statutes of 1900, c. 450, and Statutes of 1901, c. 46. See, also, cases therein cited and discussed.

this being substantially equivalent to the Massachusetts provision, though the husband's interest is still called curtesy there.⁶ In Pennsylvania the Married Woman's Act has been construed as taking away from the husband the power to convey his estate by the curtesy initiate, nor can it be taken under execution by his creditors, nor is it subject to the lien of a judgment for his separate debt, but with these modifications curtesy initiate and consummate exist as at common law, unaffected by any conveyance or will made by the wife.⁷ The court holds that curtesy initiate in Pennsylvania is something more than the inchoate right of dower, as the husband to a degree has the enjoyment of the initiate estate which his wife cannot defeat by deed or mortgage.⁸ In New Hampshire common law curtesy has been expressly reaffirmed by statute⁹ and the Vermont statute would seem to have the same effect, with the modification that on the death of his wife the husband takes one-third of her real property in fee.¹⁰

In Maine, Indiana, Kansas, Georgia, Florida, and perhaps other states, curtesy has been abolished by statute, provisions being made for the husband by the statute of descent.¹¹

A detailed account of the married woman's acts in the different states, and their effect on curtesy, and of the statutory changes which have been made is beyond the scope of this treatise. The foregoing will give in outline the general nature of the statutory changes involved.

6. *Jackson v. Jackson*, 144 Ill. 274 (holding that under married woman's act of 1861, and prior to the act of 1874, abolishing curtesy and substituting dower, the husband had no interest or estate in his wife's land during her life); Ohio Gen. Code (1910), § 8614, § 8606.

7. *Commissioners v. Poor Dist.*, 169 Pa. St. 116, at 123, 124.

8. See preceding note.

9. Public Stat. N. H., p. 640, § 9.

10. Vt. Stat., § 2542.

11. Me. Rev. Stat., p. 665, § 8; Burns Am. Ind. Stat. (1908), p. 3013. See statutes of other states under heading "Curtesy," "Descent."

1 Stim. Am. St. L., §§ 3202, 3301.

In every case of curtesy initiate which had vested as a life estate in the husband before the enactment of the statutes destroying the right, the husband's interest is protected by the provision of the constitution which forbids the impairment of vested property rights, and is therefore unaffected by such statutes.¹²

12. *Hitz v. Nat. Metropolitan Bank*,
111 U. S. 722; *Jackson v. Jackson*,
144 Ill. 274.

CHAPTER VI.

RIGHTS AND LIABILITIES OF LIFE TENANTS.

§ 132. Life Tenant and Reversioner or Remainderman.—

The nature of a life estate, and the relation existing between a life tenant and the owner of the fee in reversion or remainders, have been discussed and explained in foregoing chapters of this work. We have seen that a life tenant is the corporeal owner of the land as such during his life, and entitled as such owner to its exclusive possession and enjoyment, having the right to convey the interest which he owns like any other owner of an estate in land; that the reversioner or remainderman is the owner of the balance of the fee over and above the life estate, and that the remainderman's interest or estate is incorporeal, in that it carries with it no present right to the possession or enjoyment of the land held by the life tenant, but is a future estate, the right of enjoyment and ownership of the land as such being postponed until the life estate comes to an end.¹ We have learned also that because the reversioner or remainderman will become the owner of the land on the termination of the life estate the life tenant must not injure or destroy the estate of the reversioner or remainderman by committing waste. Since the doctrine of waste applies to all estates or tenancies not of inheritance other than tenancies at will that subject has been separately treated heretofore as one of the incidents of ownership.² Life tenants are entitled to emblements, since their estates are of indefinite duration; but as the right of emblements attaches to all estates of indefinite duration, this right has also been treated in Chapter II, herein, on Nature and Incidents of Ownership of Land.³ Having considered life estates in gen-

1. §§ 2, 88, *ante*.

3. §§ 31-36, *ante*.

2. § 60, *et seq.*, *ante*.

eral, and estates for life in dower and curtesy and the special incidents attaching thereto, there remains for our consideration certain rights and liabilities of life tenants on the one hand, and reversioners and remaindermen on the other, in their relation to each other as owners of successive estates in the same parcel of land.

§ 133. Apportionment of Rents.—Where a life tenant has leased the land to a tenant for a term of years, or has taken the property subject to such a lease made by the former owner from whom he derived his life estate, if the life tenant dies before the lease expires and between two rent days, his personal representative could not, at common law, recover rent for the period intervening between the time the last payment accrued and the death of the life tenant. The reason was that rent is not earned from day to day for the use of the property, like interest, but becomes due only on the days fixed for its payment, whether annually, semi-annually, quarterly or monthly as the case may be. Therefore in a case of a lease made before the life estate arose, where the rent is payable quarterly at the end of each quarter, and the life tenant dies a month or a week before the end of any quarter, the reversioner or remainderman would be entitled to the rent for the entire quarter, the personal representative of the deceased life tenant being entitled to no part thereof. So, also, where the lease was made by the life tenant, it necessarily came to an end on his death, and his representative could not recover rent for so much of the quarter as had elapsed before the life tenant's death, the tenant for years being freed from all obligation to pay such rent.⁴ By statute in England and in most of the states it is now expressly provided that the rent shall be apportioned between the personal representative of the

⁴. *Ex parte Cook*, 2 P. Wms. 501;
Wood v. Partridge, 11 Mass. 488, 493;
Marshall v. Mcsely, 21 N. Y. 280.

life tenant and the reversioner or remainderman in all cases where the life tenant received his estate subject to the lease, such representative receiving such proportion of the rent for the quarter or other rental period as corresponds to the continuation of the life estate during the period for which rent is paid. Thus, if the life tenant dies a month before the end of the quarter, his representative will receive two-thirds of the rent for the quarter, and the remainderman the other third. In all cases where the lease was made by the life tenant, and therefore is brought to an end by his death, the statutes provide that his representative may recover a proportionate part of the rent for the actual time elapsing up to the death of the life tenant.⁵

§ 134. Effect of Attempt to Convey Fee by Life Tenant.—

At common law an attempt on the part of a life tenant to convey an estate in fee resulted in a forfeiture of his life estate, the purchaser taking nothing, and the reversioner or remainderman acquiring an immediate right to enter and enjoy the land. This was based on the feudal notion that by so doing he renounced the feudal relation between him and his lord, the alienation amounting to a wrongful disseisin, in that the seisin would be transferred to one who would hold adversely to the reversioner or remainderman. This disseisin gave to the reversioner or remainderman an immediate right to enter or recover the land by action.

This rule applied only to common law conveyances involving an immediate transfer of seisin, viz.: by feoffment with livery of seisin, fine or common recovery.⁶ It did not apply

⁵ 2 Geo. II, c. 19, § 15; 4 Wm. IV, c. 22; 33 & 34 Vict. c. 35; N. Y. R. P. Law, § 222; N. Y. Code of Civ. Pro., § 2720 (covering case of lease made by former owner subject to which life tenant took his interest, and providing for an apportionment between life tenant's representative

and reversioner or remainderman in such case, the provision of the Real Property Law being limited to leases made by the life tenant). Stim. Am. Stat. L., §§ 2027, 2028.

⁶ Co. Litt., §§ 251, 252; 2 Bl. Com. 274, 275; *Koltenbrock v. Cracraft*, 30 Oh. St. 584.

to conveyances under the Statute of Uses either in the form of a deed of bargain and sale or a covenant to stand seised, since such deeds pass only the interest of the life tenant, and do not disturb the estate of the reversioner or remainderman, there being no transfer of seisin by livery or other act of the tenant for life, his life estate and seisin necessary to support it passing only by operation of the statute.⁷ The modern statutory deed, in no way involving livery of seisin, passes only the estate of the grantor, and therefore the rule does not apply to such conveyances. As the ancient common law conveyances have long since been obsolete, it follows that the rule has no longer any practical application, such attempted alienation of a fee resulting in the transfer of the life estate only.⁸ The rule has been expressly abolished in England, New York, and other states by statute, or has been declared by the courts to be no longer applicable.⁹

2
§ 135. Payment of Taxes.— The life tenant must pay all taxes out of the income derived from his estate. Taxes are a current charge which must be met from year to year or the property will be sold for their non-payment. Since taxes are a current charge incident to the present enjoyment of his estate on the part of the life tenant, it follows that he must pay them out of the rents and profits which he receives from the land. He is not given a life estate free and clear of the charges incident to his ownership, but subject thereto. He assumes no personal obligation to pay such taxes, however, which can be enforced against other property of which he may be the owner. He has performed his full duty when he has applied the entire income from the property, or its entire rental value, to the dis-

7. 4 Kent Com. 84; Koltenbrock, 9. 8 & 9 Victoria, c. 106, § 4; N. v. Cracraft, 30 Oh. St. 584; Jackson v. Real Prop. L., § 247; Koltenbrock v. Mancius, 2 Wend. (N. Y.) 357. v. Cracraft, 30 Oh. St. 584.

8. See preceding note.

charge of this and like charges. If the rents and profits are insufficient one year, and are more than sufficient during any succeeding year, to pay the current taxes, he must apply the surplus to the payment of the back taxes still due for the year when the income from the land was insufficient. His duty is to apply the entire income received by him during the continuance of his life estate, if necessary, to the payment of taxes accruing during that time, irrespective of when during that time the taxes accrued or the rents and profits were received.¹

The remedy of the reversioner or remainderman is to apply for a receiver who will collect the rents and profits and apply them to the payment of taxes in arrear.² If the remainderman or reversioner pays the taxes himself, in order to protect his estate from a tax sale, it would seem on principle that he should have an action against the tenant for life for money paid to the use of the tenant, but the weight of authority seems to be that no such action will lie, the remainderman being able to protect himself by bidding in the property at the tax sale.³

In the case of two successive life estates, followed by

1. *Cairns v. Chabert*, 3 Edw. Ch. (N. Y.) 312; *Sidney v. Ely*, 90 N. Y. 257; *Matter of Corbin*, 101 App. Div. (N. Y.) 25 at 28; *Murch v. Smith Mfg. Co.*, 47 N. J. Eq. 193; *Hagan v. Varney*, 147 Ill. 281.

2. *Cairns v. Chabert*, 3 Edw. Ch. (N. Y.) 312; *Sage v. City of Gloversville*, 43 App. Div. (N. Y.) 245; *Murch v. Smith Mfg. Co.*, 47 N. J. Eq. 413.

In *Sidney v. Ely*, 90 N. Y. 257, it was held that where the mortgagee paid taxes left unpaid by a life tenant, he had a right to add the amount of the payment to the mortgage debt. The court stated that in such case, as between the life tenant and remain-

derman, the interest of the life tenant would be charged with the amount of such payment. To the same effect, viz.: that on foreclosure the share of the life tenant in the surplus is chargeable with unpaid taxes. See *Fordick v. Lyons*, 38 App. Div. (N. Y.) 608.

3. *Burhans v. Van Zandt*, 7 N. Y. 523; *Foley v. Kirk*, 33 N. J. Eq. 170; *Watkins v. Green*, 101 Mich. 493; *Dunn v. Snell*, 74 Me. 22. In *Sage v. City of Gloversville*, 43 App. Div. (N. Y.) 245, it is held that a receiver appointed on the application of the remainderman may reimburse the remainderman out of the rents and profits for taxes paid by him.

a remainder in fee, each life tenant must pay taxes accruing during the continuance of his estate. The second tenant for life is not obliged to pay taxes accruing during the first life estate.⁴

§ 136. Assessments for Permanent Improvements.—Municipal assessments made for permanent street improvements, such as opening a street, laying sidewalks, putting in a sewer and the like, and becoming a lien against the land benefitted, are apportioned between life tenant and remainderman. Such an assessment is not a current charge, to be met regularly out of the income from the property, as an incident of its enjoyment, like taxes, but is a charge to be paid once and for all, for an improvement of a permanent kind which enhances the value of the reversion or remainder as well as of the life estate.⁵ The apportionment is made by dividing the assessment in proportion to the value of the estate of each. As a practical matter this has generally been done by charging the life tenant with interest on the amount of the assessment during his life, the reversioner or remainderman paying the principal, or if the assessment is paid at once, by charging the life tenant with the present value of such interest annually for the probable duration of his life in accordance with the mortality tables.⁶

Improvements made voluntarily by a tenant for life give him no claim for contribution from the reversioner or remainderman.⁷ But where property is held in trust for the

4. *Murch v. Smith Mfg. Co.*, 47 N. J. Eq. 193, and cases therein cited, holding that where a life estate is conveyed the grantee takes it subject to the payment of unpaid taxes which accrued before the conveyance.

5. *Chamberlain v. Gleason*, 163 N. Y. 214; *Pratt v. Douglas*, 38 N. J. Eq. 516, 541; *Plympton v. Boston*, 106 Mass. 544; *Bowen v. Brogan*, 119 Mich. 218.

6. *Chamberlain v. Gleason*, 163 N. Y. 214; *Cogswell v. Cogswell*, 2 Edw. Ch. (N. Y.) 231; *Cairns v. Chabert*, 3 Edw. Ch. 312; *Kocher v. Kocher*, 56 N. J. Eq. 545.

Where the improvement is temporary, benefiting the life tenant only, the entire charge falls upon the life tenant. *Wordin's Appeal*, 71 Conn. 531; *Hitner v. Ege*, 23 Pa. St. 305.

7. *Matter of Pollock*, 3 Redf. Surr.

benefit of one person for life, and for the benefit of remainders on the death of the life tenant, if improvements are made by the life tenant with the consent of the trustees which enhance the value of the property, the life tenant will be allowed the increased amount which the property brings in an accounting made by the trustees. This is in accordance with an allowance for improvements to the extent that the property is increased in value when made by one of two or more tenants in common in a partition in equity of the property so improved. Equity makes the allowance because the additional amount secured results entirely from the improvement, and should go equitably to the person who made it, the remaindermen being in no way injured since they get their remainder as though no improvement had been made. This is based on the maxim that he who comes into equity must do equity.⁸

§ 137. Insurance.—In the ordinary case of a legal life estate with a remainder or reversion thereafter, each has a definite estate which he may or may not insure as he pleases

(N. Y.) 100; *Thomas v. Evans*, 105 N. Y. 601; *Stevens v. Melcher*, 152 N. Y. 551; *Sohier v. Eldredge*, 103 Mass. 345; *Datesman's App.*, 127 Pa. St. 348; *Hogan v. Varney*, 147 Ill. 281.

Completion of a building by a life tenant started by the former owner in fee will give him the right to contribution therefor from the remainderman or reversioner, on the same basis of computation as in the case of assessments for permanent street improvements. *Parsons v. Winslow*, 16 Mass. 361; *Sohier v. Eldredge*, 103 Mass. 345.

8. *Stevens v. Melcher*, 152 N. Y. 551. In any case arising in equity where on equitable principles justice and equity require that an allowance

be made for improvements erected in good faith by one having a limited interest in the property improved, equity will require that the person making the improvements be allowed therefor, not to the extent of their cost, but to the extent of the additional value which they add to the property so improved, as a condition of granting relief in equity to the other parties interested in the property. This principle applies to improvements made by life tenants under such circumstances as well as to improvements made by tenants in common and others in a similar position. *Plimpton v. Plimpton*, 12 Cush. (Mass.) 458; *Barrett v. Strade*, 73 Wis. 385.

against loss by fire. There is no duty imposed upon the life tenant to insure for the benefit of the reversioner or remainderman, nor is there any such duty imposed on the remainderman or reversioner to insure for the benefit of the life tenant.⁹ But in the case of property held in trust for the benefit of a tenant for life, with a remainder in fee in another, the trustee may insure the property to the full fee value for the benefit of the beneficiaries for life and in remainder. In such case he may charge the beneficiaries for life and in remainder with the cost of such insurance, charging each with his pro rata share.¹⁰ In a case where life estate and remainder are both subject to a mortgage, and the mortgage requires that the premises be kept insured to the amount thereof for the benefit of the mortgagee, the life tenant is chargeable with the entire cost of insurance taken out as required by the mortgage, as it is a current charge incident to the mortgage, which, like interest, must be paid by the life tenant pursuant to his general duty to keep down encumbrances.¹

§ 138. Payment of Interest on Mortgages and Other Incumbrances.—Where real property is granted or devised to a tenant for life subject to a mortgage or other lien, without express provision covering the payment of interest, the life tenant must pay interest as it accrues on such mortgage or incumbrance. It is not intended that the life tenant shall hold the property for life free of the mortgage, which would be the situation if he was not compelled to pay interest thereon. The purpose is to give him a life estate, subject to the mortgage, viz.: a life estate in the equity of redemption. Such interest, like taxes, is a current charge which must be paid every year or half year in order that the life estate may continue and may not be ended by foreclosure, and must be

9. *Stevens v. Melcher*, 152 N. Y. 551; *Peck v. Sherwood*, 56 N. Y. 615; *Kearney v. Kearney*, 17 N. J. Eq. 59.

10. *Stevens v. Melcher*, 152 N. Y. 551, and authorities cited therein.

1. *Stevens v. Melcher*, 152 N. Y. 551.

paid out of the rents and profits derived from the land by the life tenant. The life tenant is entitled only to the net income after all such current charges have been paid.² The principal must be paid by the remainderman; but if the remainderman pays off the mortgage when it falls due he is subrogated to the position of the mortgagee and may collect the interest from the life tenant during his life. The payment of the mortgage debt by the remainderman or reversioner and the satisfaction of the mortgage is for the benefit of the remainderman or reversioner and not for the purpose of increasing the life estate from an estate in the property subject to the mortgage, or in the equity of redemption, to an estate in the property free of the mortgage lien. Therefore equity applies the doctrine of subrogation, subrogating or transferring the remainderman or reversioner to the position of the mortgagee, and treating the mortgage, by a fiction, as still in existence, for the purpose of preventing the unjust result referred to above from arising, as it otherwise would.³ As the duty of paying the principal of the mortgage debt on the expiration of the life estate devolves upon the remainderman it follows that if the life tenant pays off the mortgage when it falls due he will be subrogated to the position of the mortgagee in the same way, and will have the right to enforce the mortgage against the remainderman exactly as the mortgagee could have done, except that the remainderman will be entitled to a deduction from the total amount of the mortgage debt equal to the present value of the interest for the balance of the life tenant's life, computed as an annuity for the probable duration of

2. *Cogswell v. Cogswell*, 2 Edw. Ch. (N. Y.) 231; *Mosely v. Marshall*, 22 N. Y. 200; *Matter of Albertson*, 113 N. Y. 434; *Wilcox v. Quimby*, 73 Hun (N. Y.) 524; *Thomas v. Thomas*, 17 N. J. Eq. 356, 359; *Ivory v. Klein*, 54 N. J. Eq. 379; *Hajan v. Varney*, 147 Ill. 281.

3. *Cogswell v. Cogswell*, 2 Edw. Ch. (N. Y.) 231; *Bell v. Mayor, &c. of New York*, 10 Paige (N. Y.) 49; *House v. House*, 10 Paige (N. Y.) 158; *Murely v. Marshall*, 22 N. Y. 200; *Thomas v. Thomas*, 17 N. J. Eq. 356, 359.

his life as shown by the mortality tables.⁴ In the case of a trust estate for life, followed by a remainder in fee, the legal title in fee being in a trustee for the benefit of remainderman and life tenant as beneficiaries, if the trustee pays off a mortgage to which the interests of the beneficiaries are subject, it will be apportioned in the same way, the life tenant being charged with the interest, or the present value thereof for the probable duration of his life, the remainderman being charged with the balance of the principal.⁵

The liability of the life tenant to pay interest on such mortgages or liens is in no sense a personal one. It arises out of his holding of the life estate, and extends only to the rents and profits derived from the estate, or its rental value in case the life tenant occupies the premises for his own use. He is obliged to apply all of the rents and profits or rental value, if necessary, to the payment of interest, taxes, and other current charges, but having applied such income, received during the entire continuance of his estate, there is no personal liability enforceable against his other property, for any deficiency which may remain.⁶

4. *Bell v. Mayor, &c.*, 10 Paige (N. Y.) 49; *House v. House*, 10 Paige (N. Y.) 158; *Thomas v. Thomas*, 17 N. J. Eq. 356, 359; 1 Story Eq. Juris., § 487.

5. *Cogswell v. Cogswell*, 2 Edw. Ch. (N. Y.) 231.

6. See last four preceding notes; also *Murch v. J. O. Smith Mfg. Co.*, 47 N. J. Eq. 193; 4 Kent. Com. 75; *Pratt v. Douglas*, 11 Stew. Eq. (N. J.) 516; *Thomas v. Thomas*, 2 C. E. Green (N. J.) 356. *Real Property Law* (N. Y.), § 269.

CHAPTER VII.

LANDLORD AND TENANT; ESTATES LESS THAN FREEHOLD.

A.—Tenancies for Years.

§ 139. **Kinds of Estates Less Than Freehold.**—Estates less than Freehold include (a) tenancies for years, all tenancies for a fixed and certain term, having a definite beginning and a definite ending, whether the term be for one month, one year or a thousand years; (b) tenancies of uncertain duration, which will continue indefinitely until brought to an end by act of the parties, including tenancies from year to year, from month to month and from week to week, tenancies at will and tenancies by sufferance. Tenancies from year to year, from month to month and from week to week are in all respects like tenancies for a fixed term and subject to the same incidents except that they continue for an indefinite period until brought to an end by notice at the end of one of the successive periods. The holding of the tenant is by the year or by the month or week, and his interest cannot be terminated during the year, month or week, as the case may be, but only at the end of one of such periods, upon the giving of the notice required by law, six months or a half year's notice in the case of tenancies from year to year, a month's notice in the case of tenancies from month to month, a week's notice in the case of tenancies from week to week. Tenancies at will may be brought to an end at any time by either party at common law without notice. Tenancies by sufferance are in no true sense tenancies at all. Such a tenancy arises when a tenant, rightfully in possession, holds over after his right to the possession has come to an end, as when a tenant for a year holds over after the expiration of his term. His so-called tenancy amounts only to this, that he is not a trespasser until the landlord enters, or by some equivalent

act elects to hold him as trespasser, upon which he holds as a trespasser. The characteristics and incidents of these different tenancies are fully discussed hereafter.¹

§ 140. **Development of Estates Less Than Freehold.**—We have seen that as part of the manorial system under which the land of England was divided, the lord of the manor frequently let a portion of the land within the manor to farmers, as they were termed, men who worked the land and gave in return to the lord a part of the produce resulting. Feudal tenants holding as freeholders frequently made similar contracts with farmers. These farmers had no estate or interest in the land as such.² If their agreement with the lord or freehold tenant was under seal they could maintain an action for breach of covenant against him in case he wrongfully ousted them from possession, but they recovered damages only, not the land of which they had been deprived. If ousted by anyone else they had no remedy at all. During the first half of the thirteenth century a new writ came into use called the writ of *quare ejecit infra terminum*, giving a remedy to the lessee against his lord whether the lease was under seal or not, and also a remedy against any strangers who might oust him from the land. Under this writ, and also subsequently under the writ of *ejectio firmæ*, a tenant could recover the land itself, not only from the lord but also from any third person wrongfully entering and ousting him from the possession. Thereafter such farmers or lessees became tenants having estates in the land as against all the world, which they could hold and protect under the law.³ Before “farmers” or

1. §§ 143-150, *et seq.*, 154, 156, 157, *post.*

2. § 74, *ante.*

3. Digby Hist. L. Real Property (5th ed.), 176, 177, 243.

Since a tenant for years had only

a chattel interest in the land his estate might be defeated if the lord suffered a common recovery, viz.: Permitted a collusive suit to be maintained against him resulting in a judgment giving to the plaintiff title

tenants acquired the right to hold and enjoy against the lord and all the world their leasehold properties during the term of the letting they had no property right of any sort arising out of their holdings except the contractual right to hold the lord in damages for breach of covenant in case of ouster by him. This right was, of course, purely personal, was in no sense real property, and passed on the death of the tenant to his personal representative, not to his heir. The interest of the tenant was a purely personal contractual interest, carrying with it no interest in the land. The tenant occupied as the bailiff of his lord and his possession was his lord's possession. Of course livery of seisin was not required in the creating of such contractual rights and the incidents involving the relationship of lord and man were entirely absent. After tenants had acquired the right of ownership in the land during the term, with the right of exclusive possession and enjoyment which they could hold and defend against all the world, including their lord, they were no longer owners of a merely personal contractual right but of an estate in the land, differing from freehold estates intrinsically only in the duration of the estate. But these changes had come about very gradually through the creating and the developing of writs, by which tenants acquired remedies as heretofore explained. There was no conscious formal change, by statute or otherwise, in the nature of tenant's interests. Therefore it was natural that their rights, treated as mere personal contractual rights before these remedies were evolved, should continue to be regarded as personal property after they had developed into estates. Tenancies for years have, therefore, always been

and possession to the land. This was remedied by the statute, 21 Henry VIII, c. 15.

The writ of *ejectio firmæ* gave to the tenant a remedy by which he could recover the leased property in a case where the lord had ousted the

tenant and had thereupon conveyed to a third party by feoffment. Under the writ referred to in the text the tenant could not recover in such case as the feoffee of his lord had not evicted the tenant. Digby, 243 (5th ed.).

classed as personal property, but as they are interests in land they are termed chattels real.⁴

§ 141. **Distinguished From Freehold Estates.**—Freehold estates, comprising life estates, estates *pur autre vie* and estates in fee tail and fee simple, were the estates of freeholders holding by feudal tenure from their overlord, the relation of lord and man existing between the tenant or vassal and his lord, and all the incidents of the feudal relation attaching. Livery of seisin was essential in the creating and transfer of freehold estates.⁵ The person seised of the property was the person answerable to the lord for the feudal dues and services, and no future freehold estate was valid which would result in putting the seisin in abeyance even for a day. Therefore a freehold estate could not be created to commence at a future day except by way of remainder.⁶ Estates less than freehold, beginning as mere contractual rights and developing later into estates in land, were nevertheless still classed as personal property. Tenants for years were not freeholders; they did not hold by virtue of feudal tenure, nor did the relation of lord and man in the feudal sense exist between the tenant and his lord. Livery of seisin was not involved in the creation of their estates. Arising originally as mere contractual rights, involving no ownership of the land itself and therefore requiring no other formality originally than a contract, parol or under seal, after they had developed into estates they continued to be regarded as of the same nature, and therefore could be created by parol or in writing without formality, until the Statute of Frauds, enacted during the reign of Charles II, required that leases for over three years should be in writing. For the purposes of seisin under the feudal system the possession of the tenant was his landlord's possession, and wherever the doctrine of seisin

4. Digby Hist. L. R. P. 243; Brewster v. Hill, 1 N. H. 350.

5. See §§ 75, 76, *ante*.

6. See § 238, *post*.

is material under the modern law the same rule holds true to this day. A tenancy for years could be created to commence at a future day, since the landlord remained seised after as well as before the making of a lease, involving no abeyance of the seisin.⁷

§ 142. Relation of Landlord and Tenant; Essentials Thereof.—The relation of landlord and tenant involves in every case the existence of an estate in the tenant, whether for a shorter or a longer term, by virtue of which he is owner of the land during the term. A tenant for one year, ten years, or one thousand years is the owner of the land during his term, entitled to its exclusive possession and control just as truly as is a tenant for life or a tenant in fee. There is no fundamental difference, the only distinction in fact being in the duration of the estate. Under the law, for historical reasons stated in the preceding sections, a tenancy for years is personal property, subject to the law applying to personalty. But it is nevertheless an estate in land as truly real property in fact as a life estate. A tenant has something more than a mere privilege or license; he has ownership, exclusive and as against all the world including his landlord, and if this be absent in any disputed case the relationship of landlord and tenant does not exist. Specific illustrations appear in the sections that follow. Ordinarily the relation is created by a lease made by the landlord and delivered to the tenant; the lease is first of all a transfer or conveyance of an estate in the land from the landlord to the tenant. It is also generally a contract containing promises or covenants, the promise or covenant to pay rent being the most important. An express contract, however, is not necessarily involved in the relation of landlord and tenant; thus a tenancy for years may be created by will without any reservation of rent and without any of the elements of a contract between the tenant and the devisee of the reversion.

7. *Young v. Dake*, 5 N. Y. 463; *Becar v. Flues*, 64 N. Y. 516.

A leasehold estate may also be created by gift *inter vivos*, the reservation or payment of rent not being essential.⁸ As illustrating the nature of a tenancy for years certain cases involving the essentials of the relation of landlord and tenant may be profitably considered. Suppose a tenant leases a building with the land on which it stands for a term of years, and long before the expiration of the term the building, constituting the greater part of the value of the leasehold interest of the tenant, is destroyed by fire without fault on the part of the tenant. He will nevertheless be compelled to pay rent to the landlord as it accrues, his liability being in no way affected by the fire. His relation with the landlord is not a mere contract for the possession and use of the premises during the term, ownership and dominion being retained by the landlord. The landlord performs his part of the contract when he makes the lease and delivers it to the tenant. From that moment the tenant is the owner of the premises during the term provided for in the lease. They are his to use or lose as the case may be. The rent is not earned by the tenant's use of the premises from

8. Woodfall, Landl. & Ten. (16th ed.), 132; Averill v. Taylor, 8 N. Y. 44; Spielman v. Kliet, 36 N. J. Eq. 203; Shimer v. Phillipsburg, 58 N. J. L. 508; Becar v. Flucs, 64 N. Y. 518; Fowler v. Bott, 6 Mass. 62; Tiffany, Landl. & Ten. 1009.

"Rights *in rem* sometimes arise from an instrument which is called a contract, and are therefore said to arise from a contract. The instrument in these cases wears a double aspect, or has a two-fold effect. To one purpose it gives *jus in personam* and is a contract, to another purpose it gives *jus in rem* and is a conveyance. When a so-called contract passes an estate, or, in the language of the modern civilians, a right *in rem*, to the obligor, it is to that ex-

tent not a contract, but a conveyance, although it may be a contract to some other extent and considered from some other aspect." Austin's Jurisprudence (3d ed.), 387.

That a reservation of rent is not essential to the validity of a lease, see Co. Litt. 143a; Hooton v. Holt, 139 Mass. 54; Hunt v. Comstock, 15 Wend. (N. Y.) 665 (the court stating: "It is true no rent is reserved, but that is not material to constitute the relation of landlord and tenant between the parties"); Harris v. Frink, 49 N. Y. 24 (in which case the court held that a vendee of land under a parol contract who had been let into possession was a tenant at will, entitled to emblements, though no rent was to be paid).

day to day or from year to year, but such rent is the purchase price which the tenant agrees to pay to the landlord for the estate in the land which is transferred to him by the lease, and it follows that his obligation to pay the rent is in no way affected by the destruction of the building, just as the obligation of the purchaser of a chattel which has been sold and delivered to him, to pay therefor would be in no way affected by the subsequent destruction of the chattel.⁹ Statutes modifying this rule, but which in no way change the nature of tenancies are discussed hereafter.¹⁰

Suppose a landlord has leased land to a tenant for one year to commence from the first of May thereafter, the lease having been made and delivered on January 1st. In February the tenant gives notice that he rescinds the contract and that he will not take the premises or pay rent. The landlord may recover the rent as it falls due, and he is not obliged to look for another tenant in order to recover damages, nor is he bound to accept another tenant, so that his failure or refusal to let the premises to another tenant for a substantial rent cannot be shown in order to reduce the amount of his recovery against the tenant. By the lease, the tenant becomes the owner of the premises for the term as soon as the lease is made and delivered; he may occupy the premises or not as he pleases, but in any event he must pay the rent, which is the purchase price for the estate in the land which he has acquired. The action for rent is in no sense an action for breach of contract in such case; it is an action to recover the purchase price of the leasehold estate in accordance with the promise to pay rent contained in the lease.¹

9. *Fowler v. Bott*, 6 Mass. 62; *Graves v. Berdan*, 26 N. Y. 498; *Walton v. Waterhouse*, 3 Saund. 422.

10. Statutes in New York and elsewhere providing that on destruction of the leased premises by fire or other act of the elements the tenant may

at his election quit the premises, thereby bringing the leasehold estate to an end are discussed in § 165, notes 7 and 8, *post*.

1. *Becar v. Flues*, 64 N. Y. 518, and cases cited.

The *interesse termini*, as it is called, is the interest of the tenant under such a lease before the time fixed for the vesting in possession of his estate has arrived. He is in such case the owner of a future estate for years in the property, which will ripen into actual ownership of the land, giving to the tenant the right to recover it in ejectment as against the landlord or anyone else wrongfully withholding it from him, when the day fixed for the beginning of the tenancy has arrived.² The tenant's right to maintain ejectment against his landlord or against any stranger wrongfully depriving him of the possession goes back to the very beginning as we have seen, of the relation of landlord and tenant. His right to maintain trespass against the landlord or anyone else wrongfully entering upon the land, and the liability of the tenant to third persons rightfully on the premises for damages resulting from a dangerous condition existing on the demised land during the term all depend on the same principle, viz.: that the tenant is owner of the premises during the term.³ This principle is the key

2. *Whitney v. Allaire*, 1 N. Y. 307; *Becar v. Flues*, 64 N. Y. 518.

The landlord is not obliged to oust a former tenant wrongfully holding over or a stranger wrongfully in possession. When the time fixed in the lease for the beginning of the term has arrived the tenant may then recover the possession from such wrongful holders. *Sullivan v. Schmidt*, 93 App. Div. (N. Y.) 469; *Edesheimer v. Quackenbush*, 68 Hun (N. Y.) 427.

3. See § 171, *post*.

The case of *Baker v. Hart*, 123 N. Y. 471, clearly illustrates the rule that there must be a conveyance of an estate in the land to the tenant in order to create the relationship of landlord and tenant. The plaintiff's right in the land arose under a contract by which he was given the right

to quarry stone therefrom for a term of years, but by the terms of the instrument he was not to have possession or control of the premises for any other purpose. The defendant entered wrongfully and took stone. The court held that only an incorporeal right to enter and quarry stone was created, that no estate in the land was transferred, so that the plaintiff did not occupy as tenant. The stone did not belong to the plaintiff till quarried, and therefore he could not hold the defendant in trespass. As he was not a tenant the plaintiff could not be held for the taking of this stone by a stranger on the theory that it was waste.

In *Preston v. Hawley*, 139 N. Y. 296, the defendant, vendor of the premises, held over wrongfully after

to most of the rules of law governing the relationship of landlord and tenant.

§ 143. Tenancies for Years.—This term is applied to all tenancies less than freehold for a fixed period, whether for one day, one month, one year, or a thousand years. Though an estate for a thousand years is very much greater and more valuable than a life estate, and practically amounts to a fee, it is nevertheless a mere chattel interest in land, and passes on the death of the tenant as personal property to his personal representative, not to his heir.⁴ There are surprisingly few statutory modifications of the rule.⁵ A tenancy for years must be for a certain fixed term, or one which is reduceable to a certainty. Thus a lease for three, six or nine years from a certain date, determinable in the years 1788, 1791, 1794, was held to be a tenancy for nine years which might be determined by either party at the

the conveyance was complete. The court held that the plaintiff, purchaser of the property, could not hold the defendant for use and occupation under the statute as he was not a tenant, but a trespasser, the remedy of the plaintiff being in trespass or ejectment and for the *mesne* profits. There was no transfer of the property, by parol or otherwise, to the defendant, who occupied as a trespasser only, and the law implies no promise in such case that the trespasser pay the reasonable value of the use and occupation.

4. Co Litt. 118a; *Goodwin v. Goodwin*, 33 Conn. 314; *Dolliver v. St. Joseph's Ins. Co.*, 128 Mass. 315.

5. In Massachusetts, by statute, a term for 100 years or over shall be a freehold estate so long as 50 or more years thereof remain unexpired.

Mass. Gen. St. Ch. 121, § 1; 1 Stim. Am. Stat. L., § 1310.

In New York the only restriction upon the length of leasehold estates is the provision of the New York Constitution Art I, § 13: "No lease or grant of agricultural lands for a longer period than twelve years, hereafter made, in which shall be reserved any rent or service of any kind, shall be valid."

In New York by § 8 of the tax law (Ch. 60 of the Consolidated Laws), "rents reserved in any lease in fee or for one or more lives or for a term more than twenty-one years and chargeable upon real property within the state, shall be taxable to the person entitled to receive the same, as personal property in the tax district where such real property is situated."

end of the third or sixth year.⁶ A lease for twenty-one years after two lives in being is a tenancy for years since the beginning of the tenancy will be reduced to a certainty by the death of the persons referred to. But where the tenancy is uncertain in its duration, subject to be brought to an end by notice, it is either a tenancy from year to year, month to month, etc., or a tenancy at will.⁷ The law of landlord and tenant, as discussed in this treatise, has to do principally with tenancies for years; but the principles of law herein discussed apply to tenancies from year to year and from month to month as well as to tenancies for years, the only difference in these tenancies being in the duration of the interests and their termination by notice in the case of tenancies from month to month and from year to year. Tenancies at will, being subject to termination without notice, are radically different from tenancies of the other kinds and subject to special rules which are hereafter separately considered.⁸

§ 144. Distinction Between Tenancy and License.—A license is a mere privilege or permission given by the owner of land authorizing another to enter and to use or occupy the land or part of it for any special purpose. A contractor engaged in erecting a house for the owner is a licensee occupying the land for the purpose of performing his contract, not a tenant. Ownership and dominion over the land has not been given to him, but has been retained by the owner.⁹

6. *Goodright v. Richardson*, 3 Term Rep. 462.

7. *Murray v. Cherrington*, 99 Mass. 229.

8. See §§ 154-156, *post*.

9. *Post v. Phelan*, 3 How. Pr. N. S. (N. Y.) 133.

The cases in the notes that follow, including cases of servants, croppers,

and lodgers all illustrate the distinction between the occupation by a licensee, having at most a mere personal right in contract, and the possession and ownership of the land by a tenant, having an estate in the land, not a mere personal right against the landlord.

As between master and servant the relation of landlord and tenant does not exist if the tenant occupies a room, apartment, cottage or the like primarily for the purpose of carrying out his contract of service. There is no intent in each case that the ownership of the premises, involving their exclusive possession and control, should pass from the master to the servant during his term of service.¹⁰ If, however, a lease is made in due form in such a case, with words of letting employed, the tenant paying for the premises with his labor instead of in cash, the relation of landlord and tenant arises because there is an intent to transfer ownership to the servant during the term. The question which arises in any doubtful case is whether or not this intent to transfer to the tenant an estate or interest in the land exists as between the parties, the presumption being, in the absence of a lease or other affirmative evidence of a tenancy, that the servant is to occupy merely in that capacity and not as a tenant where such occupation is necessary or convenient to his employment as servant, or is otherwise connected with his service as an incident thereof.¹ The

10. *Kerrains v. The People*, 60 N. Y. 221; *McQuade v. Emmons*, 38 N. J. Law 397.

Farm laborers, occupying a house on the farm during their term of service, the use of the house and other privileges being given, together with wages, for their services, are not tenants. *Haywood v. Miller*, 3 Hill (N. Y.) 90; *People v. Annis*, 45 Barb. (N. Y.) 304; *Bowman v. Bradley*, 151 Pa. St. 351; *Edgar v. Jewell*, 34 N. J. Law 239.

In *Ofschlager v. Surbeck*, 22 Misc. (N. Y.) 595, it appeared that a deduction from the farm laborer's wages was made for rent, and that the employer had stated in affidavits that he had "rented" the premises to the servant. The court held that

the question was properly submitted to the jury, and their finding that a tenancy existed was supported by the evidence.

Domestic servants occupying rooms of the employer are never tenants. *State v. Curtis*, 20 N. C. 363.

Caretakers in occupation of premises as such are not tenants, but servants. *Presby v. Benjamin*, 169 N. Y. 377; *Seymour v. Warren*, 86 App. Div. (N. Y.) 403.

A clergyman in occupation of a parsonage or rectory is a tenant, not a servant. *Bristor v. Burr*, 120 N. Y. 427; *Doe d. Jones v. Jones*, 10 Barn. & C. 718.

1. *Ofschlager v. Surbeck*, 22 Misc. (N. Y.) 595; *McQuade v. Emmons*, 38 N. J. Law 397 (dicta); *Kerrains*

occupation by a servant as such is, of course, that of a licensee.

A servant has no estate in the land, and like any other licensee whose license is not coupled with an interest, he may be ousted forcefully by the master from the premises so occupied. The servant is a mere trespasser after his license is revoked by his discharge or by the termination of his employment in any other way.² Some authority to the effect that a tenancy by sufferance arises if the servant is allowed to remain in possession for some time after his employment is terminated must be regarded as not settling the law to that effect. A trespasser does not become a tenant at sufferance by any holding over, however long continued, and as a servant wrongfully remaining in possession is not a tenant holding over after his tenancy has termi-

v. The People, 60 N. Y. 221 (dicta), the court quoting Tindal, C. J., in *Hughes v. Chatham*, 5 M. & G. 54, as follows: "There is no inconsistency in the relation of master and servant with that of landlord and tenant. A master may pay his servant by conferring on him an interest in real property, either in fee, for years or at will * * * and if he do so the servant then becomes entitled to the legal incidents of the estate as much as if it were purchased for any other consideration."

In *Bristor v. Burr*, 120 N. Y. 427, the court, holding that the possession by a minister of a parsonage was that of a tenant, said: "This is presumptively the relation assumed to premises by a party who lawfully enters upon them as a place of abode and occupies them as such; and any less right than that which possession furnishes is dependent upon some understanding, express or implied, denying such relation."

This language is sound as applied to the facts of that case, but in the case of the ordinary servant, such as a gardner, coachman or lodgekeeper, who occupies a cottage or living quarters in connection with the performance of his service the presumption is that he occupies as servant, which stands until overthrown by evidence of a lease. *Kerrains v. The People*, 60 N. Y. 221.

2. See cases cited in last two preceding notes, also *Doyle v. Gibbs*, 6 Lans. (N. Y.) 180.

N. Y. Code of Civ. Pro., § 2231, subd. 1, provides that a servant holding wrongfully after termination of his service except in New York city and Brooklyn, may be ousted by summary proceedings; but the right of the employer to oust the servant in any other way permitted him by the common law is in no way affected. *Haywood v. Miller*, 3 Hill 90.

nated, but a trespasser only, it follows that these cases are not sound.³

§ 145. Leases for Advertising Purposes.—The distinction between a license and a tenancy is clearly illustrated by the so-called advertising cases, the right to use a wall, or to erect and maintain a sign for advertising purposes being given by an instrument in the form of a lease. In a New York case recently decided it appeared that a lease had been made by which the plaintiff let to the defendant "all the roof on the premises" for a term of years, to be used solely for a bulletin board for displaying advertising at an annual rental of \$2,000, defendant to have access to the roof for the purpose of erecting and maintaining the sign. The court held that a tenancy was not created, saying: "It is quite clear that the defendant was not given exclusive possession of the premises at any time. . . . But it seems to me the essential element of a lease of real property is lacking, for by it the defendant acquired no right of possession of the property, but simply a right to erect an advertising sign upon the plaintiff's building with a right of access to the sign when erected."⁴ In these cases the

3. *Jennings v. McCarthy*, 16 N. Y. Supp. 161. In *Kerrains v. People*, 60 N. Y. 221, the court said (*dicta*), referring to *People v. Annis*, 45 Barb. 604: "I am unable to agree with the learned judge who delivered the opinion in that case, that immediately upon the termination of the service a tenancy at will, or by sufferance, springs up. In order to have that effect the occupancy must be sufficiently long to warrant an inference of consent to a different holding."

That mere holding by a trespasser will not create a tenancy at will or by sufferance. See *Dodin v. Dodin*, 32 Misc. (N. Y.) 208, the court hold-

ing that mere occupation for eight years without affirmative recognition of the occupier as a tenant by the owner, did not create the relationship of landlord and tenant.

4. *United Merchants' Realty & Imp. Co. v. N. Y. Hippodrome*, 133 App. Div. (N. Y.) 582. See, also, *Reynolds v. Van Beuren*, 155 N. Y. 120; *Goldman v. N. Y. Adv. Co.*, 29 Misc. (N. Y.) 123; *Lowell v. Strahan*, 145 Mass. 1.

In *Pickering v. O'Brien*, 23 Pa. Super Ct. 125, the court held that the relation of landlord and tenant arose because the lease necessarily gave to the advertiser the right to oc-

possession of and dominion over the property is retained by the owner, the advertiser being given a license only by the so-called lease.

In a Massachusetts case the relationship of landlord and tenant was held to arise under a formal lease of an ice business and privileges in Lynn, at Flax Pond, with the use and benefit of the owner's ice houses, the tenant getting exclusive possession of the ice houses and land under them at least. Here there was involved the transfer and ownership of a definite part of the realty, not mere occupation for some defined purpose as licensee.⁵

§ 146. Contracts to Work Land for Share of Crops.—Farming on shares as usually conducted does not involve the relationship of landlord and tenant. The farmer in the usual case contracts to work the land and to share the crops with the owner. He occupies the farm as licensee in order to grow the crop pursuant to his contract, he and the owner being tenants in common of the crop as it grows. The exclusive possession and control as owner is not transferred to the farmer.⁶ But where a lease is made between them,

occupy the quantum of land required for the advertising board. But that is true in every case of a license involving the use of some part of the premises in a continuous way.

In *Jordan v. Indianapolis Water Co.*, 159 Ind. 337, the court held that the advertiser was a tenant for the reason that such a lease is equivalent to a letting of the premises to the advertiser, the landlord reserving the use of the premises for all other purposes. It is submitted that this argument is unsound because the owner does not turn over the possession to the advertiser, making himself a licensee only with respect to every other use of the premises. He in-

tends to reserve possession, dominion and ownership in himself, giving a special privilege to the advertiser as occupier for that single purpose.

5. *Roberts v. Lynn Ice Co.*, 187 Mass. 402.

The leasing of the exclusive privilege of the public stenographer's office in a hotel was held to create a license, not a tenancy. in *Hess v. Roberts*, 124 App. Div. (N. Y.) 328.

6. *Taylor v. Bradley*, 39 N. Y. 129, and cases discussed therein; *Rawley v. Brown*, 71 N. Y. 85; *Unglish v. Marvin*, 128 N. Y. 380; *Gray v. Reynolds*, 67 N. J. Law 169; *Warner v. Abbey*, 112 Mass. 355; *McKeeby v. Webster*, 170 Pa. St. 624.

words of letting in due form being employed, a share of the crops to be rendered to the owner as rent, the general rule is that the relation of landlord and tenant arises, such being the expressed intention of the parties, which intention is not frustrated by the circumstance that instead of rent in money a portion of the crop is to be given to the landlord.⁷ In New York, by the weight of authority, and in the New England States, the use of words of letting in the written agreement between the parties is not conclusive. Though the instrument be in the form of a lease the courts hold that the parties do not intend to create the relationship of landlord and tenant; that a contract for working the land on shares is all that is intended, the possession of the farmer being that of a licensee, the crops as they grow belonging to both as tenants in common.⁸ But where a lease in the ordinary form is used containing expressions clearly and unequivocally declaring the intention of the parties that the relationship of landlord and tenant shall arise, as where it is agreed that the tenant shall deliver to the landlord a certain share of the products of the farm as rent, it being clear that the exclusive possession and control of the entire farm is to be in the tenant, with the right to grow such crops as he pleases in the course of good husbandry, the courts are forced, even in these jurisdictions, to hold that tenancies are created.⁹ The rule generally prevailing that

7. *Reeves v. Harman*, 65 N. J. Law 249; *Mundy v. Warner*, 61 N. J. Law 395; *Rowland v. Vochting*, 115 Wis. 352; *Sargent v. Courier*, 66 Ill. 245; *Orcutt v. Moore*, 134 Mass. 48; *C. & W. M. Ry. Co. v. Linard*, 94 Ind. 319, 328.

8. *Taylor v. Bradley*, 39 N. Y. 129; *Caswell v. Districh*, 15 Wend. (N. Y.) 379; *Putnam v. Wise*, 1 Hill (N. Y.) 234; *Griswold v. Cook*, 46 Conn. 198; *Lewis v. Lyman*, 22 Pich. (Mass.) 437.

9. In *Rawley v. Brown*, 71 N. Y. 85, at page 90, the court admirably stated the three possible legal relations which may arise out of this situation as follows: "The relations that may exist under such circumstances are various and of frequent occurrence, and the title to the products of the farm and the labor are different in all, and in each may be varied by the convention of the parties. The relation may be that of lessee and lessor, with or without a lien

where a lease is made, words of letting used, and the intention thereby expressed to create a tenancy, the relation of landlord and tenant arises, is entirely sound. The strict construction followed in New York and New England seems not in accord with the principle that the intention of the parties should govern.

§ 147. Contracts for Board and Lodging.—A contract for board and lodging is not a lease, and the relationship of landlord and tenant does not arise, since no estate in the property is transferred to the lodger. He is not given the

in favor of the landlord upon the crops for the rent; it may be that of master and servant, the occupant being the laborer and hired servant of the owner, and the naked custodian of the products, his possession being that of the owner; or the crop may be raised for the joint benefit of both, one contributing his labor and the other giving up his land for their production, each sharing in such proportion as may be prescribed by the agreement." The court held that in the absence of evidence of a lease a charge to the effect that the crops presumptively belonged to the farmer who worked the land was error.

In *Colville v. Miles*, 127 N. Y. 159, the court recognized a letting on shares as creating the relationship of landlord and tenant, holding that the crops before division were the sole property of the tenant.

On the other hand in *Taylor v. Bradley*, 39 N. Y. 129, after an admirable statement of the reasons why the expressed intent of the parties should control, the court said: "Notwithstanding these suggestions, the balance of the authorities above cited seems to be, that, notwithstanding

the technical terms employed, such an agreement does not amount to a technical lease; that the relation of landlord and tenant is not contemplated, and the portion of the crops reserved to the owner is not rent, but compensation for the use of the land, while the other portion is compensation to the occupier for his work, labor and services, etc.; and that the legal possession of the land is in the owner, and the two are tenants in common of the crop."

In the above case, and in the other cases cited in the preceding note, words of letting were used, but in other respects the instrument contained the usual details of the customary agreement for working the land on shares. If there had been an express agreement that the farmer should occupy exclusively as tenant, rendering a share of the crops to the owner as rent, then, under the cases above quoted from, the relationship of landlord and tenant would certainly arise. To same effect, *McCielan v. Whitney*, 65 Vt. 510; *Arcutt v. Moore*, 134 Mass. 48, and cases cited in note 7, *supra*.

exclusive possession of the room or apartment which he occupies, as owner for the time being. He occupies as a licensee, with no right to exclude the owner, or to hold the owner in trespass in case he enters. The ownership and possession is retained by the owner, the rights of the lodger being strictly *in personam* under his contract, and not *in rem*.¹⁰ But a lease in the usual form, with words of letting, transferring to the tenant an interest or estate in the room or apartment for a definite term, creates the relationship of landlord and tenant though the lease may also contain a contract for board, and for services in caring for the rooms. If the intention to transfer an estate or interest in the room or apartment is expressed, so that the tenant becomes owner thereof, with the right to exclude all others, even the landlord, except as the landlord has reserved the right to enter for stated purposes, the relation of landlord and tenant arises.¹ But if the usual agreement for board and lodging is all that is expressed the lodger occupies as a licensee, not as a tenant.²

§ 148. **Form of Lease.**—Before the enactment of the Statute of Frauds during the reign of Charles II, leases creating tenancies for a term of years, no matter how long the term might be, were valid though not in writing. As a tenant for years was not seised, livery of seisin was not required in creating his estate, which, as we have seen, is a chattel interest, and therefore may be created by parol or in writing without a seal, a deed not being required.³ The creating of an easement, profit, franchise, or other incorporeal interest for a term of years required a deed under seal since these interests lay “in grant” and not in livery.

The Statute of Frauds (29 Car. 2, ch. 3, § 1) enacted in

10. *Wilson v. Martin*, 1 Denio (N. Y.) 602; *Oliver v. Moore*, 53 Hun (N. Y.) 472; *White v. Maynard*, 111 Mass. 250; *Cochran v. Tuttle*, 75 Ill. 361.

1. *Oliver v. Moore*, 53 Hun 472; affirmed without opinion, 131 N. Y. 589; *Porter v. Merrill*, 124 Mass. 534.

2. See case in note 10, *supra*.

3. Litt., § 60; Co. Litt., 9a, 49b.

1677, provided that all leases, estates, interests of freehold or terms of years, in, or out of lands, tenements or hereditaments, not in writing and signed by the party or parties making or creating the same or their agents thereunto lawfully authorized by writing, should have the effect of estates at will only, excepting "leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord, during such term, shall amount to two-thirds part at least of the full improved value of the thing demised." Under the statute, followed in several states, leases of over three years must be in writing signed by the lessor or by his agent duly authorized in writing.⁴

In New York and a majority of the states every lease for over a year must be in writing, signed by the lessor or his agent duly authorized in writing.⁵

A lease for a year or less to arise *in futuro* need not be in writing under the New York and similar statutes, as the expression "from the making thereof," which appears in the Statute of Frauds, has been omitted from such statutes. Upon the making of the parol lease the tenant immediately becomes the owner of an estate for a year in the premises, the lease operating as a conveyance to that effect, though the estate will not vest in possession until a later date.

4. 2 Gen. St. N. J. pl. 602, § 1; South Car. Civ. Code of 1902, § 2416; Missouri Rev. St. of 1899, § 3414; Pennsylvania Act Mar. 21, 1772. The provision as to rent equal to two-thirds the improved value of thing demised has been omitted in the New Jersey Statute.

In Maine, Vermont, New Hampshire, Massachusetts and Ohio all leases for a term must be in writing, parol leases having the force and effect of tenancies at will only. Me. Rev. St. of 1903, ch. 75, § 13; Vt. Pub. St. of 1906, § 2582; Mass. Rev. Laws of 1902, ch. 127, § 3.

The statute, 8 and 9 Vict. ch. 106, § 23, requires a seal on all leases for over three years. In Mass. a seal is required on leases for 7 years or over, New Jersey, 3 years, Virginia, 5 years. See Stim. Am. St. L., § 1471.

5. N. Y. Real Prop. Law, § 242.

A lease for less than a year with option to renew for another year need not be in writing under the N. Y. Statute. Ward v. Hasbrouck, 169 N. Y. 407. It would seem clear, however, that if the renewed period is for more than one year, the provision for such renewal would be void unless in writing.

Therefore it does not come within the provision of the Statute of Frauds which requires that a contract not to be performed within a year must be in writing. The lease as a conveyance operates at once, and in so far as a transfer of the term is concerned the lease is performed as soon as made.⁶ Some authorities take the opposite view, losing sight of this characteristic of a lease as a conveyance.⁷

A contract to make a lease, as distinguished from a lease, had to be in writing under the fourth section of the Statute of Frauds, since it is a contract to transfer an interest in lands. Under the New York and similar statutes such a contract has to be in writing only when the lease which is to be made is to be for over one year.⁸ It would seem that this contract would come under the provision of the statute relating to agreements not to be performed within a year

6. *Becar v. Flues*, 64 N. Y. 518; *Ward v. Hasbrouck*, 169 N. Y. 407; *Crane v. Powell*, 139 N. Y. 379, 389; *Seymour v. Warren*, 59 App. Div. (N. Y.) 120; *Birkhead v. Cummins*, 33 N. J. Law. 44.

In *Oliver v. Moore*, 53 Hun (N. Y.) 472, a contract for board and lodging to extend beyond a year was void by parol, because not to be performed within a year. If the relation of landlord and tenant had arisen the statute would not have applied.

7. *Delano v. Montague*, 58 Mass. 42; *Larkin v. Avery* 23 Conn. 304; *Wheeler v. Frankenthal*, 78 Ill. 124; *Matthews v. Carlton*, 189 Mass. 285.

8. N. Y. Real Prop. Law, § 259. A contract for the leasing for a longer period than one year, or for the sale, of any real property, or an interest therein, is void, unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the lessor

or grantor, or by his lawfully authorized agent. *Czermak v. Wetzel*, 114 App. Div. (N. Y.) 816. The authority of the agent to execute a contract to lease or sell land need not be in writing. *Moody v. Smith*, 70 N. Y. 598; *Tallman v. Franklin*, 14 N. Y. 564. An agent's authority to execute a lease for over a year or a conveyance must be in writing by the express provision of § 242 of the N. Y. Real Property Law.

A contract to make a lease as distinguished from a lease, transfers no estate to the person who is to be tenant; he receives only a personal right in contract for the breach of which he may recover damages, and he may usually enforce the specific performance thereof in equity. *Mayer v. McCreary*, 119 N. Y. 434; *Benedict v. Pincus*, 191 N. Y. 377; *Pittsburgh Amusement Co. v. Ferguson*, 100 App. Div. (N. Y.) 453, 115 App. Div. 241.

in cases where by the terms of the contract the actual lease is not to be made within a year from the making of the contract.⁹

§ 149. Renewal of Lease.—A covenant to renew the lease at the end of the term calls for the making of a new lease between the parties. It is a covenant which runs with the land so that it may be enforced by an assignee of the lease, and against a grantee of the reversion, and it may be enforced by specific performance, if valid, in equity.¹⁰ Of course this covenant gives no right to a second or further renewal at the end of the first renewed term unless such right is expressly provided for.¹

A provision that the tenant may extend the term for an additional period, or that the tenant "shall have the option" of one or two more years, or other period, on the same terms and conditions, provided he give a notice to that effect at a stated time before the expiration of the original term, is not a covenant to make a new lease. On the giving of the notice provided for, the original term is at once extended for the further term without the making of a new lease. The original lease creates the extended term upon the giving of the required notice, and the holding of the tenant is under the original lease, not under a new lease made at the expiration of the original term.²

9. See cases in notes 6 and 7, *supra*.

10. *Van Buren v. Wotherspoon*, 164 N. Y. 368; *Kolasky v. Michaels*, 120 N. Y. 635.

1. *Winslow v. Baltimore*, 188 U. S. 646; *Pflum v. Spencer*, 123 App. Div. (N. Y.) 742.

2. In *Swan v. Inderlied*, 187 N. Y. 372, where the tenant was given the privilege to extend the lease for one or two years upon the same terms, etc., the court said: "We are of

opinion that the defendant held the premises after May 1st, 1903, not by virtue of any new agreement, express or implied, but under the original letting. The provision of the lease is not that the tenant may require a new lease from the landlord, but that he may extend the original lease for as additional term of one or two years. In other words, the demised term was for one, two or three years, as the tenant might elect." The court held that the assignment of rent

B.—Tenancies from Year to Year, from Month to Month, etc.

§ 150. **Nature and History.**—Tenancies from year to year, from quarter to quarter, from month to month and from week to week differ from tenancies for years in that they are tenancies of indefinite duration, continuing indefinitely by the year, quarter, month or week until brought to an end by notice given by landlord to tenant or by tenant to landlord. They differ from tenancies at will in that they cannot be brought to an end at any time, during any year or month, but only at the end of one of the periods by which they are held. Thus a tenancy from year to year can be terminated by either party only at the end of some succeeding year, and a tenancy from month to month at the end of some succeeding month. All the incidents of tenancies for years apply to these tenancies, the one difference being in their duration.³ These tenancies developed originally

under the original lease carried the rent for the period of renewal.

In *Probat v. Rochester Steam Laundry Co.*, 171 N. Y. 584, the holding over and payment of rent by a tenant holding under such provision for extension, was held to be an election by the tenant to hold for the extended term, though no express notice of such election was given, and that the assignee of the tenant as bound exactly as the tenant would have been. See, also, *Pflum v. Spencer*, 123 App. Div. (N. Y.) 742; *Cunningham v. Pattee*, 99 Mass. 248.

3. Some question has been raised as to whether tenancies from year to year, from month to month, etc., are subject to waste, it having been suggested, and held in one case, that they are tenancies at will, except for the purpose of termination, and therefore such tenants, like tenants at will, are not liable for permissive waste,

and may be held in trespass for acts of voluntary waste. *Phillips v. Covert*, 7 Johns. (N. Y.) 1. It is submitted that such tenancies are in every respect like tenancies for years except for their indefinite duration, and that they differ radically from tenancies at will in that the tenancy must certainly continue for a year or a month, as the case may be. A tenant at will is liable in trespass for an act of voluntary waste because his tenancy may be ended at any time, and the hostile act of waste terminates the estate, and such tenant is not liable for permissive waste because of the slight character of his interest, the statutes of Marlbridge and Gloucester being construed on this account as not applying to tenancies at will. Tenancies from year to year, from month to month, etc., are not subject to such termination and are clearly within the terms of the

from tenancies at will. Early in the history of the law of landlord and tenant it was recognized that an indefinite tenancy by the year, month, etc., rent being reserved and paid by the year, quarter, month or week, differed radically from ordinary tenancies at will, in which the holding was merely indefinite, and not so measured by periods, and that such tenancies should not be subject to termination without notice during one of the periods for which rent was paid. It was at first held that reasonable notice should be given by or to such tenants in order to terminate the tenancy, and that the tenancy could be so ended by notice only at the end of one of the succeeding periods. As a matter of custom between landlords and tenants, finally accepted by the courts and adopted as law in all cases, it was settled that a tenancy from year to year could be terminated only by the giving of six months' notice by the landlord to the tenant or by the tenant to the landlord, as the case might be, such notice being given at least six months before the date on which the tenancy was to end, such date being the end of one of the yearly periods, and corresponding to the day of original letting.⁴ Thus in the case of a tenancy from year to year beginning on May 1st of any year, the notice to terminate must be given at least six months before the first of May of some succeeding year, the notice specifying that the tenancy shall end on the first of May of that year. A notice to quit on any other day, as on May 2d or April 29th

statutes in question. The prevailing and sound view is that such tenants are liable for both voluntary and permissive waste, like tenants for years. *Brown v. Newbold*, 44 N. J. L. 266; *Moore v. Townshend*, 33 N. J. L. 284; *Ferguson v. ———*, 2 Esp. 590.

4. 2 Bl. Com. 147, Chitty's Notes; *Right v. Darby*, 1 Term R. 159; *Doe d. Strickland v. Spence*, 6 East 120; *Steffins v. Earl*, 40 N. J. L. 128;

Jackson v. Wilsey, 9 Johns. (N. Y.) 267.

"This kind of a lease was in use as long ago as the reign of Henry VIII." 2 Bl. Com. 147, Note, citing Year Book T. 13, Henry VIII, 15, 16. That six months' notice was required as early as the time of Henry VIII was stated by Lord Ellenborough in *Doe d. Strickland v. Spence*, 6 East 120. See, also, cases cited under § 151-153, *post*.

of the year would be void.⁵ The same rules were subsequently applied by the courts to tenancies from quarter to quarter, from month to month and from week to week, except that reasonable notice in these cases was fixed as a matter of law to be notice equal to the period, viz., three months' notice in tenancies from quarter to quarter, a month's notice in tenancies from month to month, and a week's notice in tenancies from week to week.⁶

These tenancies arise in three different ways: 1. By a holding over on the part of a tenant at the expiration of a fixed term, whether for one or more years or for less than a year, followed by the acceptance of rent by the landlord on the terms of the expired lease, or by an election on the landlord's part to treat the tenant as such and not as a wrongdoer. 2. By an express agreement between the parties creating an indefinite tenancy by the year, month, etc., including cases where the parties designate the tenancy as a tenancy from year to year or from month to month, etc., and also including all cases of indefinite lettings in which rent is reserved by the year, month, etc. 3. By entry and payment of rent under a parol lease void under the Statute of Frauds, rent being paid in accordance with the terms of the void lease.

§ 151. Tenancies Created by Holding Over, etc.—The holding over by a tenant at the end of a fixed term of years, followed by the payment of rent to the landlord on the terms of the lease just expired, creates a tenancy from year to year when rent was reserved by the year under the expired lease, and a tenancy from month to month when such rent was reserved by the month.⁷ Though the rent be pay-

5. See preceding note.

6. See note 4, *supra*, also, Peacock v. Ruffin, 6 Esp. 4; Prindle v. Anderson, 19 Wend. (N. Y.) 381; 23 Wend. 616.

7. Right v. Darby, 1 Term R. 159;

Dougal v. McCarthy, 1 Q. B. 736; 2 Bl. Com. 147, Chitty's note; Condon v. Barr, 47 N. J. L. 113; Berstein v. Demmert, 73 N. J. L. 118; Streit v. Fay, 230 Ill. 319; Ganson v. Baldwin, 93 Mich. 217. In Maine and Massa-

able in monthly installments, nevertheless if the rent is reserved by the year the tenancy arising from a holding over and payment of rent after such a lease is a tenancy from year to year.⁸ The tenancy is implied from the holding over and the payment of the former rental. It is clear the parties do not intend a tenancy at will in such case, determinable at any time. There is no expressed intention to create a tenancy for a year certain or a month certain. There exists an implied general letting by the year or by the month, as the case may be, not limited to a year or a month certain; in other words it is a tenancy of indefinite duration by the year or by the month. Whether the original tenancy be for one or five or more years, there would seem to be nothing in that circumstance to infer a tenancy for a year certain as arising by implication from the holding over and payment of rent.

When the tenant holds over he becomes a tenant by sufferance, as we shall see.⁹ The landlord has the right to elect whether he will hold the tenant as a wrongdoer, holding over wrongfully, or as tenant from year to year.¹⁰ His accepting rent is, of course, an unqualified election to accept him as tenant. Any other unequivocal action on his part, as the starting of an action to recover rent from the tenant, will have the same effect. The tenancy which the law implies from such holding over and election does not depend on any actual contract, express or implied, between the landlord and tenant, because the tenant is liable for the rent at the landlord's election though he held over avowedly as a wrongdoer, expressly stating to the landlord that he had no intention to hold or become liable as tenant. In

chusetta, under the statutes, only a tenancy at will arises. *Franklin, etc. Co. v. Card*, 84 Me. 528; *Perry v. Rockland, etc. Co.*, 94 Me. 325; *Walker Ice Co. v. American, etc. Co.*, 185 Mass. 463.

8. *Peacock v. Ruffin*, 6 Esp. 4; *Stef-*

fins v. Earl, 40 N. J. L. 128; *Berstein v. Demmert*, 73 N. J. L. 118 (inferentially to that effect).

9. See § 158, *post*.

10. See cases in notes 7 and 8, *ante*, and in note 2, *post*.

such case the law imposes this obligation on the tenant as an incident of the relation of landlord and tenant and as a penalty for wrongfully holding over. But whether the tenant intends to bind himself or not, the tenancy that results from the landlord's acceptance of rent or election to hold him must be of exactly the same nature. It is a tenancy of indefinite duration by the year or month, as the case may be, and not a tenancy for a year or a month certain. The weight of authority as well as the principle involved sustain this view.¹

In New York, however, the courts hold that the tenancy arising from a holding over and acceptance of rent, or from a holding over and an election to hold the tenant for the rent on the part of the landlord, is a tenancy for a year certain or a month certain as the case may be. The reasons for this holding are not obvious and are not expressed by the cases so deciding. The rule probably grew out of loose statements in some of the earlier opinions that a tenancy for a year or a month arose in such case, the court evidently meaning that the tenancy arising was for at least a year or a month as the case might be since it could not be brought to an end before the end of the current year or month. From these statements, followed in later cases, the rule has become settled, more by accident, perhaps, than by design, that a tenancy for a year or a month certain arises in such case, which ends at the end of each succeeding year or month without notice. Though the New York courts speak of it as a tenancy from year to year or from month to month, it is very evident that it is nothing of the kind, but a tenancy for a fixed period.²

1. See cases in note 7, *ante*.

2. *Kennedy v. City of New York*, 196 N. Y. 19; *Schuyler v. Smith*, 51 N. Y. 309; *Haynes v. Aldrich*, 133 N. Y. 287; *Herter v. Mullen*, 159 N. Y. 27; *Adams v. City of Cohoes*, 127 N. Y. 175 (*dicta*); *Conway v. Stark-*

weather, 1 Denio (N. Y.) 113; *Cole v. Sanford*, 77 Hun 198; *Sullivan v. Ringler*, 59 App. Div. (N. Y.) 184; *Baylies v. Ingram*, 84 App. Div. 360. In *Despard v. Walbridge*, 15 N. Y. 274, where the tenant held over at the end of his term after being noti-

The terms of the original lease including the rent, the making of repairs and restrictions and conditions of all kinds provided for in the lease under which the tenant held, are carried over and become terms of the implied tenancy arising from the holding over by the tenant and election by the landlord. This is true whether the tenancy so arising is a tenancy from year to year or from month to month, the prevailing rule, or a tenancy for a year or a month certain, as in New York.³

In England a holding over does not create a further tenancy against the will of the tenant at the landlord's option. Circumstances showing an actual agreement fairly to be implied therefrom must be proved in order to establish such a tenancy.⁴ In the United States where the harsher rule that the tenant may be held at the landlord's election in case of a holding over, even though the tenant has expressly disclaimed any intention to be bound for a further period, a willful holding over for even a day renders the tenant liable for another year's or month's rent, as the case may be, at the election of the landlord. But where his holding over is not wrongful, as where the landlord expressly or impliedly gives him permission to remain for a time,⁵ or where he is forced to remain in possession through illness of himself or some member of his family, the tenant will not be punished by the application of this rule; he is liable in such case only for the reasonable value of the use of the premises during the period of his holding over.⁶ But where the failure of the tenant to move on time

fied that his rent would be increased, he was held for the higher rent.

3. See cases cited in preceding notes under this section, particularly *Baylies v. Ingram*, 84 App. Div. 360.

4. *Ibbs v. Richardson*, 9 Adol. & E. 849; *Waring v. King*, 8 Mees & W. 571; *Dougal v. McCarthy*, 1 Q. B. 437.

5. *Rosenburg v. Lastgarten*, 41 St. Rep. (N. Y.) 623.

6. *Herter v. Mullen*, 159 N. Y. 28; *Regan v. Fosdick*, 19 Misc. (N. Y.) 489; *Brennan v. City of New York*, 80 App. Div. 251, and cases cited and discussed therein (holding that accidental retention of the keys and leaving of two old stoves on premises did not constitute a holding over). A holding over by a tenant in common occupying under a lease from his co-

is due to difficulty in getting trucks, or rests on any other difficulty which the tenant might have provided against in advance, he is liable, as above explained, at the landlord's election.⁷

§ 152. Same — Created by Express Agreement.— The parties may by express agreement create a tenancy from year to year, from month to month, etc. Where, by express terms the lease provides that the tenant shall hold indefinitely from year to year or from month to month, the tenancy will be subject to all the rules heretofore discussed governing such tenancies.⁸

tenant, does not make him liable as a hold over tenant. He has the right to possession by virtue of his interest as tenant in common. *Valentine v. Healy*, 178 N. Y. 391.

7. *Hayes v. Aldrich*, 133 N. Y. 287, and cases cited therein. In this case the lease ending May 1st, the tenant held over till May 4th. May 1st was a holiday, and the court said he had possibly till noon of May 2d, in which to surrender possession. But on May 2d he could not secure trucks and on May 3d a sick boarder could not safely be removed. The court held that the holding over to May 3d made the tenant liable for another year's rent. The court also said (*dicta*) that the excuse of the illness of the boarder could not be used because the subletting of the premises to a boarding house keeper and the use of the premises for that purpose was contrary to the terms of the lease, and the tenant should not be permitted to set up the consequences of one wrong as an excuse for another. It is probable that this *dicta* would not be followed, as the landlord has his action for any breach of con-

dition or covenant by the tenant, and there seems to be no valid reason why he should be subjected to further punishment by making him liable as hold-over tenant because of so remote a consequence of the breach of condition as the illness of the boarder in this case.

In jurisdictions holding that a tenancy from year to year or from month to month arises from such holding over, the common law notice of six months and one month respectively must be given, as in any other case of such tenancies arising by express agreement or otherwise. In New York all the principles and rules applying to such tenancies apply to tenancies for a year or a month which arise from a holding over in that state, except that no notice is required to terminate them. See cases in preceding notes under this section.

8. *Doe v. Green*, 9 Ad. & E. 658; *Pugsley v. Aikin*, 11 N. Y. 494; *Stefins v. Earl*, 40 N. J. L. 128; *Herrell v. Sizeland*, 81 Ill. 457 (notice of 60 days provided for by statute in Illinois); *Fox v. Nathans*, 32 Conn. 351; *Dix v. Atkins*, 130 Mass. 171 (hold-

A tenancy, which by the express or implied terms of the letting is to continue for an indefinite period at an annual or monthly rental is a tenancy from year to year or from month to month by express agreement as truly as in those cases where the terms "from year to year" or "from month to month" are used. Originally such holdings were tenancies at will, and it is probably true that tenancies from year to year, etc., were first developed and recognized in these cases. It is clear that in these cases the parties do not intend that the tenancy may be terminated at any time, but only at the end of one of the succeeding periods. The parties therefore intend an indefinite tenancy by the year or month, which is an exact definition of tenancies from year to year or from month to month.⁹

These tenancies are subject to the same rules applying to tenancies from year to year and from month to month, etc., created in other ways, requiring the same notice to terminate them, of six months and one month respectively, and terminable only at the end of one of the succeeding periods as heretofore explained. In New York there can be no doubt under the cases that these tenancies are genuine tenancies from year to year or from month to month, and not tenancies for a year or a month certain, and therefore that they require the regular common law notice to terminate them, viz., six months' notice in tenancies from year to year and a month's notice in tenancies from month to month.¹⁰ The few cases where the contrary has been sug-

ing that such tenancies may be created by express agreement, though a tenancy at will only arises in the other cases of such tenancies at common law); *Finkelstein v. Herson*, 55 N. J. L. 217; *Hetfield v. Lawton*, 108 App. Div. 113. See, also, New York case cited in note 10, *post*.

⁹ *Richardson v. Langridge*, 4 Taunt. 128; *Doe d. Hull v. Wood*, 14

M. & W. 682; *Steffins v. Earl*, 40 N. J. L. 128; *Williams v. Apothecaries Hall Co.*, 80 Conn. 503; *Hey v. McGrath*, 81 Pa. St. 310; *Hollis v. Burns*, 100 Pa. St. 206. See, also, New York cases cited in following note.

¹⁰ *Pugsley v. Aiken*, 11 N. Y. 494 (tenancy "for the term of one year and an indefinite period thereafter,"

gested are either cases of so-called monthly tenancies, viz., tenancies for a month certain followed by holding over and payment of rent creating tenancies for another month, and so on indefinitely, which include most of the cases suggesting a doubt as to the requirement of notice, or they are cases in which inferior courts have misconstrued the law laid down by the Court of Appeals.¹ A statute applying only to New York City and Brooklyn requires the giving of five day's notice by the landlord to any monthly tenant five days before the end of the month, except on May 1st, as a condition precedent to the ousting of the tenant by dispossession proceedings.² It is clear that this statute applies

the court saying: "To terminate the tenancy, the lessee must have given six months' previously, notice of his intention to do so" * * *); *Hetfield v. Lawton*, 108 App. Div. 113 (tenancy "for the term of one year * * * with the privilege of continuing the same from year to year" * *, the court saying: "The defendant undoubtedly under the terms of his lease became a tenant from year to year"); *Anderson v. Prindle*, 23 Wend. 619; *Wilson v. Taylor*, 8 Daly 253; *Geiger v. Braun*, 6 Daly 506; *People v. Darling*, 47 N. Y. 666; *Hoffman v. VanAllen*, 3 Misc. (N. Y.) 99 (letting "from month to month so long as the rent was paid" held to require a month's notice) *Klingenstein v. Goldwasser*, 27 Misc. 536 (tenancy "for as long as you will stay and pay the rent" at a monthly rental—held an indefinite tenancy from month to month requiring a month's notice to end it); *Rybicki v. Kalish*, 58 Misc. 219 (an indefinite tenancy by the month requiring a month's notice, Appellate Term. *Gildersleeve J.*) *Jackson v. Wilsey*, 9 Johns. 267; *Hungerford v. Wagoner*, 5 App. Div. 590.

1. In *Gibbons v. Dayton*, 4 Hun 453, and *Thompson v. Chick*, 92 Hun 510, the tenancy was for one month certain, renewed at the end of each month for another month under the New York rule as to holding over discussed in § 151, *ante*, the tenancy could be terminated at the end of any month without notice. Such confusion as has arisen in New York in these cases has arisen in using the term "yearly tenancy" as applying to a tenancy from year to year or from month to month, and *visa versa*. In *Luddington v. Garlock*, 29 St. Repr. 607, the court found from the special facts of that case that the parties had agreed that a month's notice should not be required, but only reasonable notice. The court recognized the rule that a month's notice is usually necessary. *People v. Goellet*, 64 Barb. 476, and *Park v. Castle*, 19 How. Pr. 29 are *contra*, and must be regarded as of no weight against the many cases cited in the preceding note..

2. L. of 1882, ch. 303, am'd by L. of 1899, ch. 357, § 1. "No monthly tenant shall hereafter be removed from any lands or tenements in the

only to tenancies for a month certain, with successive holdings over commonly called monthly tenancies, which is the usual tenure of tenants holding by the month in New York city, and that it does not apply or affect tenancies from month to month which require a month's notice from tenant to landlord as well as from landlord to tenant in order that the party giving the notice may end the tenancy.³

§ 153. Indefinite Tenancies Arising Under Void Lease for Years.—Entry by a tenant under a parol lease void under the Statute of Frauds, followed by the acceptance of rent by the landlord, or any other unequivocal act on his part by which he recognizes the tenant as holding under the terms of the void lease, gives rise to a tenancy from year to year or from month to month, dependent upon whether the void lease reserved rent by the year or by the month. The parol lease is, of course, void, the tenancy arising by such entry and payment of rent being implied from those facts, in the absence of proof of a different agreement between the parties, the reasonable inference being that the parties intended an indefinite tenancy by the year or month, as the case may be, on the terms of the void parol lease.⁴ All the terms and conditions of the void lease are

City of New York or in the City of Brooklyn on the grounds of holding over his term (except when the same expires on the 1st day of May." unless five days before the expiration of the term the landlord serve notice upon the tenant terminating the tenancy.

3. See cases cited in note 10, *supra*.

The case of *Simpson v. Masson*, 11 Misc. 351, decided that a tenancy for one month and from month to month thereafter could be terminated on five days' notice under the statute, a clear illustration of the confusing of tenancies from month to month with the

monthly tenancies provided for by the statute.

In *Hoske v. Gentzlinger*, 87 Hun 3; *Hedden v. Nederburg*, 25 Misc. 722, and *Foley v. Shalow*, 16 N. Y. Supp. 942, the tenancy in each case was for a month certain, requiring no notice except the five day notice specified by the statute. In the *Hoske* case it appeared that the tenant had given a month's notice. This was held to relieve the landlord from the duty of giving five days' notice under the statute.

4. *Clayton v. Blakey*, 8 Durf. & E. 3; *Doe dem. Tilt v. Stratton*, 4 Bing.

carried over into the implied letting except the duration of the lease, and even its duration is carried over to this extent, that when the end of the term provided for in the void lease has been reached the implied tenancy from year to year or from month to month ends without notice,⁵ though at the end of any other year six months or a month's notice, as the case may be, would be required to bring it to an end.⁶

In New York the sort of tenancy which arises in such a case is not clearly settled. Where the void lease reserves rent by the year, there is *dicta* which has been accepted as law by text writers that a tenancy for a year certain arises from such an entry and the payment of rent, the holding over at the end of each year thereafter creating a tenancy for another year, no notice being required, therefore, to terminate the tenancy at the end of any year. This seems to be based on the idea that in entering and paying rent on a yearly basis the parties intend a holding for the longest time permitted under a parol lease, viz., a year.⁷ In the

446; *Reeder v. Sayre*, 70 N. Y. 180; *Longhran v. Smith*, 75 N. Y. 205; *Lounsbery v. Snyder*, 31 N. Y. 514; *Coudert v. Cohn*, 118 N. Y. 309; *Talamo v. Spitzmiller*, 120 N. Y. 37; *Huntington v. Parkhurst*, 87 Mich. 36; *Koplitz v. Gustavus*, 48 Wis. 48, and cases cited; *Hollis v. Burns*, 100 Pa. St. 206, and cases cited in following notes under this section.

5. The cases in note 4, *supra*. On the point that no notice is required to terminate at end of term provided for in parol lease, see *Doe dem. Tilt v. Stratton*, 4 Bing. 446; *Reeder v. Sayre*, 70 N. Y. 180; *Coudert v. Cohn*, 118 N. Y. 309. That covenants of void lease are carried over, see, also, *Kernochan v. Wilkens*, 3 App. Div. (N. Y.) 596; *Larkin v. Avery*, 23 Conn. 304 (holding that in Connecticut statutory notice of thirty days

has taken the place of common law six months' notice).

6. See cases in notes 4 and 5 preceding.

7. *Adams v. City of Cohoes*, 127 N. Y. 175. In this case, after stating that the tenancy is one which may be ended without notice at the end of any year, like the tenancy arising from a holding over, the court pointed out that more than six months' notice had actually been given through the tenant's quitting the premises and tendering them to the landlord on August 1st, hiring and occupying other premises, and refusing to pay rent thereafter, the current year expiring on May 1st, thereafter. Therefore the position taken that no notice was necessary was not required for the decision of the case, and was *dicta*.

case of an entry under such a void lease in which rent was reserved by the month, however, the tenancy has been held to be a tenancy from month to month, requiring a month's notice to end it as at common law.⁸ These cases are clearly sound, since it is impossible reasonably to infer a tenancy for a month certain or a year certain from such an entry under a void parol lease reserving rent by the month. The *dicta* above referred to that entry and payment of rent under a void lease reserving rent by the year creates a tenancy for a year certain has little to sustain it on principle, is opposed to the rule laid down in like cases where rent is reserved by the month, and is opposed to statements contained in other cases decided by the Court of Appeals to the effect that a tenancy from year to year arises under such circumstances.⁹ This question must be still regarded

McAdam and Chaplin on Landlord and Tenant accept this case as law.

8. *People v. Darling*, 47 N. Y. 666; *Anderson v. Prindle*, 19 Wend. 391; 23 Wend. 619; *Geiger v. Braun*, 6 Daly 506.

9. In *Lounsbery v. Snyder*, 31 N. Y. 514, the court holds that a tenancy from year to year arose from an entry and payment of rent under a parol lease for five years, which might have been terminated at the end of any year by a proper notice. The court does not state what a proper notice would be, but clearly *some* notice was held to be necessary, the fair inference being that the court had in mind the usual notice of six months.

In *Reeder v. Sayre*, 70 N. Y. 180, the court held that a tenancy from year to year arose under a parol lease for two years, and that notice to quit given to the tenant by a vendee under a contract to purchase from the landlord was not sufficient to end the tenancy. It must be given by the

owner of the legal estate, the holder of the record title. This case is clearly authority for the rule that notice is necessary to terminate the tenancy at the end of any given year, and that no notice need be given at the end of the term fixed by the parol lease, though there is no explicit reference to a notice of six months.

In *Longhran v. Smith*, 75 N. Y. 205, an entry and payment of rent under a lease for five years was held explicitly to create a tenancy from year to year. The court said: "In some cases it has been said that a parol lease for a longer period than a year is good as a lease for a year, but if by that is meant that a contract which the statute declares void, may nevertheless take effect, and be enforced as if the term specified had been a year only, it is difficult to see how the proposition can be maintained consistently with the statute. (*Thomas v. Nelson*, 69 N. Y. 161) * * *. By the entry, occupation and pay-

as an open one in New York with the weight of authority and of principle in favor of the rule that a tenancy from year to year or from month to month arises, as at common law, requiring the regular notice of six months and one month respectively to terminate them. The parties actually intended a tenancy which will continue for the period agreed upon in the void parol lease. This intent is defeated by the invalidity of the parol lease. It is clear that from the entry and payment of rent under the void lease, therefore, the parties do not intend a tenancy limited to one year, but a tenancy which is to continue indefinitely by the year, the terms of the void lease being impliedly agreed upon as the terms of this implied letting, except for the duration of the term.¹⁰

Mere entry under such a lease creates at most a tenancy at will. In order that a tenancy from year to year or from month to month shall arise there must be the acceptance of rent by the landlord or some other unequivocal act by which a tenancy in accordance with the terms of the void lease is recognized by both parties as existing between them.¹

C.—Tenancies at Will.

§ 154. Nature and Characteristics.—A tenancy for no

ment of rent they became tenants from year to year, with the right to terminate the lease on the 30th day of April of any year on giving due notice (*Braythwayte v. Hitchcock*, 10 M. & W. 494).” The court held that the tenant having quit on August 1st could not avoid payment of rent for the balance of the year. No question of notice was, therefore, involved, but the court clearly takes the position that a tenancy from year to year arose, requiring due notice (or six months’ notice, an English case to that effect being cited) to terminate it.

In *Coudert v. Cohn*, 118 N. Y. 309, entry and payment of rent under a parol lease for two years and five months at a yearly rental was held to create a tenancy from year to year. The court recognizes the rule that the tenancy would terminate at the end of the parol term without notice, which necessarily involves recognition of the rule that the tenancy could not be terminated at the end of any other year except by notice of six months.

10. See cases in notes 8 and 9, *supra*.

1. *Talamo v. Spitzmiller*, 120 N. Y. 37.

fixed period, nor for life or in fee, which is held at the will of both the landlord and the tenant and may be terminated by either at any time, is a tenancy at will.² The tenant at will has no estate or interest for any fixed period, as in the case of a tenant for years, nor has he an interest which will continue to the end of a succeeding month or year, as in the case of a tenancy from month to month or from year to year. His tenancy, apart from statute, may be ended by his landlord or by himself at any time without notice.³ A tenancy of indefinite duration expressly made at the will of the landlord is a tenancy at will, and is therefore held at the will of the tenant, and a tenancy held at the will of the tenant is also held at the will of the landlord.⁴ It is clear that a tenancy for a fixed term of years is not a tenancy at will, though it be made subject to termination at the will of either party, or of both, since an estate for a fixed term is created, subject to be brought to an end by either party at any time. Unless brought to an end by affirmative action on the part of either the landlord or the tenant, it will continue for the full term provided for, unaffected by the death of either party, or by the conveyance or assignment of the

2. "Tenant at will is, where lands or tenements are let by one man to another, to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession." Litt., § 68. To same effect, 2 Bl. Com. 145. See notes immediately following, and discussion, particularly with reference to tenancies for years or for life or in fee, expressly determinable at the will of one or both of the parties.

3. Litt., § 68; 2 Bl. Com. 145-147; Harris v. Frink, 49 N. Y. 24; Doe dem. Bastow v. Cox, 11 Ad. & El. N. S. 122, and cases in following notes.

4. "It is regularly true that every lease at will must in law be at the

will of both parties, and therefore when the lease is made, to have and to hold at the will of the lessor, the law implyeth it to be at the will of the lessee also; for it cannot be only at the will of the lessor; but it must be at the will of the lessee also. And so it is when the lease is made to have and to hold at the will of the lessee, this must be also at the will of the lessor; and so are all the books that seem *prima facie* to differ, clearly reconciled." Co. Litt., 55a; Doe dem. Bastow v. Cox, 11 Ad. & El. N. S. 122; Western Transp. Co. v. Lansing, 49 N. Y. 499; Cheever v. Pearson, 33 Mass. 266; Knight v. Indiana, etc. Co., 47 Ind. 105.

interest of either.⁵ It is also clear that if the instrument creating the tenancy is sufficient to create a freehold estate, either for life or in fee, and the intention to create such an estate is sufficiently expressed, a tenancy at will does not arise, since a tenancy at will is a mere chattel interest in land of the lowest nature. Such an estate is not a tenancy at will merely because it may, in terms, be ended by one party or the other at any time. It is a tenancy for life or in fee subject to termination at the option of either party in accordance with the terms of the instrument creating the estate.⁶

Though the tenant's interest be of the slightest nature,

5. Leases for a definite term, terminable on notice or by surrender; can be terminated only by compliance with the terms of the lease relating to each surrender or termination. *Goelet v. Spofford*, 55 N. Y. 647; *Reich v. McCrea*, 37 N. Y. St. Rep. 620; *Dierig v. Callahan*, 35 Misc. (N. Y.) 30; *Woodbridge Co. v. Hires Co.*, 19 App. Div. (N. Y.) 128; *Hendry v. Squier*, 126 Ind. 19; *Hooks v. Forst*, 165 Pa. St. 238; *Pratt v. Paine*, 119 Mass. 439.

6. *Gilmore v. Hamilton*, 83 Ind. 196; *Ely v. Randall*, 68 Minn. 177. Some misapprehension of the passage quoted from Coke's *Littleton* in note 4, *supra*, has developed in the cases. It is clear that in referring to tenancies terminable at the will of one party as being also terminable at the will of the other, the author referred to tenancies at will, of indefinite duration, and not to tenancies for years or for life or in fee terminable at the will of either landlord or tenant.

"All that the passage cited from Coke means is that if there is a demise with no term fixed between the

parties except the will of the lessor, then it is implied by law to be also at the will of the tenant." *Cotton, L. J. in In re Threlfall*, 16 Ch. Div. 264.

A lease of certain premises at an annual rent so long as the premises are used for the purposes of manufacturing cheese created an estate for life, not a tenancy at will, since it is clear that it was not to be ended by either party at any time, but only on the stated contingency. *Warner v. Tanner*, 38 Oh. St. 118. For the same reason a grant reserving an annual rent of property "so long as the salt works are improved or stand on said land," etc., *Hurd v. Cushing*, 7 Pick. (24 Mass.) 169, and a lease for so long as the tenant should keep furnaces on the premises, *Cook v. Bisbee*, 35 Mass. 527, created estates for life, not at will.

But a contract to "let, lease and give possession" without stating the term in any way, the intention being to create a leasehold interest, not a freehold estate, created at most a tenancy at will. *Gardner v. Hazleton*, 121 Mass. 494.

nevertheless the relation of landlord and tenant exists and the leased premises belong to the tenant while the tenancy at will is permitted to continue, so that he may maintain trespass against a stranger who has made a wrongful entry,⁷ and ejectment against a stranger wrongfully ousting him therefrom.⁸ He is also, as we have stated in a preceding chapter, entitled to emblements.⁹ He is not liable for permissive waste, his interest being so slight that the courts construed the Statute of Marlbridge and Gloucester as not applying to tenancies at will.¹⁰ An act of voluntary waste on his part, being an act of hostility to the landlord, terminates the tenancy by ending the concurrence of the two wills essential to the existence of the estate, and the tenant is liable therefor to his landlord in trespass.¹¹

§ 155. Creation of Tenancies at Will.—To create a tenancy at will the leased premises must be transferred to the tenant as temporary owner, as in all other cases where the

7. *Hamilton v. Dennison*, 56 Conn. 359; *Foley v. Wyeth*, 84 Mass. 135; *Goodwin v. Clover*, 91 Minn. 438.

If the trespasser commits a permanent injury to the premises, doing injury to the landlord's interest in reversion, the landlord may also sue him in trespass. *Starr v. Jackson*, 11 Mass. 519; *Davis v. Nash*, 32 Me. 411.

Since tenants at will are not subject to an action of waste, but are liable in trespass for their own acts of voluntary waste (See notes 10 and 11, *post*), this is the only remedy which the landlord has for permanent injury done by a stranger. When the trespasser does no permanent injury, injuring only the possession and right of enjoyment of the tenant at will, the landlord cannot maintain an action against the trespasser. *French v. Fuller*, 40 Mass. 104.

8 *Covert v. Morrison*, 49 Mich. 133, and authorities therein cited and discussed. As a tenant at will has an estate, giving him the right of exclusive possession and enjoyment against the world until the estate be terminated, his right to maintain ejectment is clear, though there is little authority on the question. See *Tiffany, Landlord and Tenant*, Vol. II, ch. 33.

9. *Co. Litt.* 55a; 2 *Bl. Com.* 145-147; *Harris v. Frink*, 49 N. Y. 24; *Brown v. Thurston*, 56 Me. 126. See §§ 31-35, *ante*.

10. *Co. Litt.* 57a; *Phillips v. Covert*, 7 Johns. (N. Y.) 1; *Moore v. Townshend*, 33 N. J. L. 284; *Lothrop v. Thayer*, 138 Mass. 466. See *Waste*, § 60, *et seq.*, *ante*.

11. *Chalmers v. Smith*, 152 Mass. 561, and cases in preceding note.

relationship of landlord and tenant is created. Therefore possession by a trespasser with the knowledge of the owner, or possession by a licensee for a stated purpose, does not create a tenancy at will. The relationship of landlord and tenant must arise.¹ A tenancy at will may arise (a) by express agreement as in any case where a tenancy for no stated term is expressly made at the will of both parties or at the will of either one.² This class includes tenancies of indefinite duration in which rent is reserved by the month or year, or the like, as well as cases in which there is no such reservation of rent, provided the tenancy be expressly made at the will of the parties, or either of them.³ (b) Tenancies at will most frequently arise in cases of a general letting for an indefinite period without reservation of a rent by periods, and without an express provision for a holding at will. If rent be reserved by the year, month, etc., a tenancy from year to year or from month to month, etc., arises, as we have seen.⁴ But if there be no reservation of rent by such periods the tenancy is necessarily terminable by either party at any time, and is therefore a tenancy at

1. *Osgood v. Dewey*, 13 Johns. (N. Y.) 240. See § 144, *ante*, as to distinction between tenancy and license.

That mere silence on the owner's part does not change the wrongful possession of a trespasser or of a licensee holding in violation of his license into a tenancy at will, that a lease or demise in some form, express or implied, is necessary, see *Ley v. Peter*, 3 Hurl. & N. 101; *Moore v. Smith*, 56 N. J. Law, 446 (hold-over tenant is tenant by sufferance only until by some affirmative act the landlord elects to hold him as tenant under the terms of the former lease); *Bodwell Granite Co. v. Lane*, 83 Me. 168; *Blum v. Robertson*, 24 Cal. 127.

If the facts attending the holding

and the forbearance by the owner are such as to indicate a holding by mutual consent, it is a question of fact for the jury or the court as to whether a tenancy at will has arisen, the tenancy existing if such mutual consent be found as a fact. *Zilch v. Young*, 184 Ill. 333; *Jennings v. McCarthy*, 40 N. Y. St. Rep. 678 (employer holding over six months after termination of employment presumed to hold at will of employer).

2. *Doe dem. Bastow v. Cox*, 11 Ad. & El. (N. S.) 122; *Burns v. Bryant*, 31 N. Y. 452.

3. *Doe dem. Bastow v. Cox*, 11 Ad. & El. (N. S.) 122.

4. §§ 150, 152, *ante*.

will.⁵ Certain special cases of this class of tenancies at will should be specially considered. A vendor, let into possession of real property before the closing of title, is a tenant at will, both at law and in equity in cases where the contract to sell is void and unenforceable because not in writing, or for any other cause, and at law only when the contract is valid and enforceable by specific performance.⁶ In this latter case, however, the vendor in possession is, in equity, owner of the property in question.⁷ A tenant who holds over with the consent of his landlord for an indefinite period and for a stated purpose, is a tenant at will, no rent being agreed upon, the parties expressly or impliedly agreeing that the tenant shall not be liable as a holdover tenant from year to year or from month to month. This tenancy is at the will of both parties for an indefinite period.⁸ Entry under a void lease, void under the Statute of Frauds or for any other reason, creates a tenancy at will pending the time of its conversion into a tenancy from year to year or from month to month by the acceptance of rent by the landlord. It is a tenancy of indefinite duration which may be ended by either party at any time, the tenant entering as such with the consent of the landlord.⁹ A parol gift of real property, void because not by deed, creates a tenancy at will upon entry. The tenant occupies as owner at the will of the maker of the gift.¹⁰

5. *Richardson v. Langridge*, 4 Taut. 128; *Burns v. Bryant*, 31 N. Y. 452; *Larned v. Hudson*, 60 N. Y. 102, and cases in following notes.

6. *Doe d. Tomes v. Chamberlaine*, 5 M. & W. 14; *Harris v. Frink*, 49 N. Y. 24; *Freeman v. Headley*, 33 N. J. L. 523; *Washburn v. White*, 197 Mass. 540. Such vendee is not liable for rent or for use and occupation, since by express or implied agreement he is to pay nothing for the use of the premises.

7. *Brighton Beach R. Ass'n v. Home Ins. Co.*, 113 App. Div. (N. Y.) 526, and cases therein cited (*Aff'd* 189 N. Y. 526).

8. *Emmons v. Scudder*, 115 Mass. 367; see § 151, *ante*.

9. *Talamo v. Spitzmiller*, 120 N. Y. 37.

10. *Jackson v. Rogers*, 1 Johna. Cas. (N. Y.) 33, cited in *Harris v. Frink*, 49 N. Y. 24.

§ 156. **Termination of Estates at Will.**—As we have seen, a tenancy at will may be brought to an end by either party at any time without notice.¹ Statutes have been enacted in many states requiring the giving of notice.² In New York and several other states, the landlord is required to give a tenant at will thirty days' notice, though no notice is required from the tenant to the landlord, the tenant having the right to terminate the tenancy at any time without notice.³

Since the tenancy depends upon the mutual concurrence of the will of landlord and tenant, anything which breaks that concurrence terminates the tenancy. Thus the death of either landlord or tenant ends the tenancy at will.⁴ A conveyance by the landlord of the property occupied by the tenant terminates the tenancy for the same reason.⁵ An

1. See § 154, *ante*. A demand or other act showing an intent to terminate the tenancy by the landlord must be proved before ejectment or dispossession proceedings can be started. *Zilch v. Young*, 184 Ill. 333. But the starting of an ejectment suit which fails or is discontinued will terminate the tenancy so that a later suit may be maintained against the tenant. *Chamberlain v. Donahue*, 45 Vt. 50.

The tenant can terminate the tenancy only by relinquishing possession. A mere notice to that effect without giving up possession does not affect the tenancy. *Chandler v. Thurston*, 27 Mass. 205; *Shaw v. Hill*, 79 Mich. 86; *Bartlett v. Robinson*, 52 Neb. 715.

2. In New Jersey, Massachusetts, Michigan, Minnesota and some other states notice of three months must be given by landlord to tenant or by tenant to landlord. N. J. Acts 1903, c. 13, § 3; Mass. Rev. Laws, 1902, c. 129, § 12; Mich. Comp. L., 1897,

§ 9257; Minn. Rev. L. 1905, §3332.

3. N. Y. Real Prop. L., § 228; Cal. Civ. Code, § 789 (1 month); Burns Statutes, Indiana, 1901, § 7088 (1 month). In Maine, Iowa, and some other states 30 days' notice is required from tenant to landlord as well as from landlord to tenant.

These statutes do not apply to termination by conveyance by landlord or attempted assignment by tenant or by death of either party, no notice being required in such cases. *Howard v. Merriam*, 59 Mass. 563; *Curtis v. Galvin*, 83 Mass. 215; *Cooper v. Adams*, 60 Mass. 87.

4. Co. Litt. 57b; 2 Bl. Com. 146.

5. *Curtis v. Galvin*, 83 Mass. 215; *Emmes v. Feeley*, 132 Mass. 346 (Conveyance of part of premises terminates tenancy; taking of easement for public street, without eviction of tenant, does not end tenancy); *Lash v. Ames*, 171 Mass. 487; *Mars- ters v. Cling*, 163 Mass. 477 (sale under execution of landlord's interest

attempted assignment by the tenant of his interest is void, and the attempt results only in bringing the tenancy at will to an end.⁶ If the landlord permits the assignee in such case to occupy the premises on the same terms, a new tenancy at will arises; it is in no respect a continuance of the former tenancy.⁷

On the termination of his estate a tenant at will is given a reasonable time in which to move his goods and chattels from the premises.⁸

In New York § 232 of the Real Property Law provides that an agreement for the occupation of real property in the City of New York, which shall not particularly specify the duration of the occupation, shall be deemed to continue until the first day of May thereafter. The courts have held that this section does not apply to a tenancy from year to year or to a monthly tenancy, as distinguished from a tenancy from month to month, since the duration of a tenancy for a month, and then for another month by holding over, is definitely stated, and a tenancy from year to year is to continue for a full year at least, or beyond May 1st after the tenancy arises.⁹ The statute in question does apply to a

ends tenancy); *Mentzer v. Hudson Sav. B.*, 197 Mass. 328 (lease by landlord has same effect); *Cofran v. Sheppard*, 148 Mass. 582 (conveyance of undivided interest by tenant in common, same result).

6. *Co. Litt.* 57a; *Reckhow v. Schanck*, 43 N. Y. 448; *Landon v. Townsend*, 129 N. Y. 166; *Cooper v. Adams*, 60 Mass. 87.

7. *Landon v. Townsend*, 129 N. Y. 166.

A sublease made by a tenant at will is binding as between the tenant and subtenant. *Holbrook v. Young*, 108 Mass. 85 (holding that the tenant at will was liable to his subten-

ant for breach of the covenant of quiet enjoyment); *Austin v. Thompson*, 45 N. H. 113.

8. *Litt.*, § 69; *Lash v. Ames*, 171 Mass. 487 (holding that if the tenant fails to remove his effects within reasonable time landlord may remove them and store them at his expense and risk); *Livingston v. Tanner*, 14 N. Y. 64; *Moore v. Boyd*, 24 Me. 242.

9. *Olson v. Schlevoritz*, 91 App. Div. (N. Y.) 405; *Schloss v. Huber*, 21 Misc. 28; *Gilfoyle v. Cahill*, 18 Misc. 63. In the last case cited the court erroneously treated a tenancy from month to month arising by entry and payment of rent under a void

tenancy from month to month, since it is an indefinite tenancy by the month, the duration of which is not specified. Such tenancy may be terminated by a month's notice at the end of any month, the only effect of the statute being that on May 1st after the tenancy arises it comes to an end without notice.¹⁰ The statute would seem to apply to a tenancy at will, resulting in the termination of the tenancy without notice on the May 1st after the tenancy arises. It has been held, however, that the statute does not apply to a tenancy at will.¹¹

D.—Tenancies at Sufferance.

§ 157. **Nature and Characteristics.**—A tenancy at sufferance arises in any case when a tenant for years, from year to year, from month to month, etc., a tenant at will, or a tenant *pur autre vie*, or other tenant rightfully in possession, holds over after his tenancy has been brought to an end. He is in no proper sense a tenant, and the relation of landlord and tenant does not exist between him and the owner of the land in reversion or remainder.¹ All that the

lease as a monthly tenancy, viz.: for a month certain, and held that the statute did not apply.

10. *Spies v. Voss*, 16 Daly 171; *Bernstein v. Lightstone*, 36 Misc. 193; *Galensky v. Applebaum*, 32 Misc. 203.

11. *Jennings v. McCarthy*, 40 N. Y. St. Rep. 678.

It is clear that if the tenancy is expressly at the will of the parties it may be ended at any time before May 1st by either party, and if the statute applies it changes the tenancy at will into a tenancy till May 1st thereafter which may be ended at the will of either party. If the tenancy is simply an indefinite holding consented to by the landlord, and not expressly terminable by either party at will, which

was the situation in the case above cited, it clearly comes within the statute, and what would otherwise be a tenancy at will becomes a tenancy until May 1st thereafter which neither party can terminate before that date. It is difficult to see how the court can justify its position that such a letting specifies its duration.

1. "A tenancy at sufferance is he that at the first came in by lawful demise and after his estate ended continueth in possession and wrongfully holdeth over," Co. Litt. 57b. To same effect. 2 Bl. Com. 150.

A tenant for years holding over is a tenant at sufferance. *Jackson v. Parkhurst*, 5 Johns. (N. Y.) 128; *Moore v. Smith*, 56 N. J. L. 446;

so-called tenancy at sufferance amounts to is this—that the tenant is not a disseisor, not having made a wrongful entry, and therefore is not liable as a trespasser until the landlord regains possession by entry or by ejectment, when, by relation, the so-called tenant becomes a trespasser from the beginning of his wrongful holding over, and may be held liable as such,² and that his possession is not adverse to the landlord, and he cannot acquire title by twenty years of such possession, unless it appears that he avowedly holds adversely to the landlord under some pretended title other than such as arises from his holding over.³ The reasons underlying these tenancies show exactly their nature and limitations, and turn entirely on the doctrine of disseisin as related to the action of ejectment and to title by adverse possession. A mere wrongdoer who enters upon the land of another and takes exclusive possession as owner, whether under pretended claim of title or not, is a disseisor, and becomes seised of the property, of his own wrong, but never-

Poole v. Engelke, 61 N. J. L. 124; *Edwards v. Hale*, 91 Mass. 462; *Devine v. Lord*, 175 Mass. 384.

Tenant at will holding over after termination of his estate by notice, conveyance, etc., is tenant by sufferance. *Marsters v. Cling*, 163 Mass. 477; *Emmes v. Feeley*, 132 Mass. 346.

The assignee of a tenant at will, in possession as such assignee, is a mere trespasser, not a tenant by sufferance, since he enters as a wrongdoer, the attempted assignment terminating the tenancy at will. *Reckhow v. Schank*, 43 N. Y. 448.

Lessee of tenant for life holding after the death of the life tenant is a tenant at sufferance. *Doe d. Thomas v. Roberts*, 16 M. & W. 780; *Manning v. Brown*, 47 Md. 506.

In *Pearce v. Ferris*, 10 N. Y. 280, a subtenant of a tenant for years, holding over after the expiration of

the original term, was held to be a trespasser. The action was ejectment, and it is evident that the court in stating that they were all trespassers meant that they were trespassers at the election of the landlord, which election was shown by the ejectment suit.

2. 1 *Tiffany Landl. & Ten.*, 145, 146; 3 *Bl. Com.* 210; *Jackson v. Cairns*, 20 Johns. (N. Y.) 301; *Leland v. Tonsey*, 6 Hill (N. Y.) 328; *Dorrell v. Johnson*, 34 Mass. 263; *Rising v. Stannard*, 17 Mass. 282.

Though before entry by the landlord trespass will not lie against a tenant by sufferance, yet case will lie for injuries done by tenant before entry by the landlord. *Russell v. Fabyan*, 34 N. H. 218.

3. *Jackson v. Cairns*, 20 Johns. (N. Y.) 301; *Leport v. Todd*, 32 N. J. L. 124.

theless seised, so that in an action of trespass brought by the record owner he can be held only for the wrongful entry, but no damages may be recovered in the trespass suit for the wrongful withholding of the property. The record owner must recover his possession, either by peaceful entry or by ejectment, before he can hold the wrongdoer in damages for such wrongful withholding of the land; the owner then being entitled to recover what are termed the mesne profits from the wrongdoer.⁴ Since a tenant by sufferance has made no wrongful entry, but merely fails to move out when his tenancy expires, he is not guilty of a disseisin, and therefore cannot be held in trespass. Since he continues to hold possession of the land against the right of the record owner, such owner must enter or maintain ejectment before he can hold the tenant for mesne profits, as in the case of the mere wrongdoer. The tenant's possession being thus ended, and having been clearly wrongful, by relation he becomes liable as trespasser for the mesne profits from the beginning of his holding over.⁵ His holding over is not adverse within the meaning of the law of title by adverse possession because there has been no disseisin, and the holding is *prima facie* a continuance of his former tenure, and therefore not theoretically under claim of title adverse to the landlord, though actually hostile.⁶

§ 158. Tenancies at Sufferance Under Statute.—By statute in New York and several other states tenancies at sufferance are classed with tenancies at will, and the same

4. See note 2, *supra*, particularly the thorough treatment of this question in 1 Tiffany's Landl. & Ten., 145, 146; Bigelow on Torts (7th ed.), §§ 469, 470.

5. See note 2, *supra*.

6. See note 3, *supra*.

A tenant *pur autre vie*, holding over after the death of the *cestui que vie*, is a tenant at sufferance, but his

holding is regarded as adverse under the statute of limitations. There is no inference that he continues to hold by the same tenure, since the remainderman or reversioner is a stranger to him, differing radically from a holding over by a tenant for years, from year to year, or at will. See 1 Tiffany Landl. & Ten. 148, *et seq.*

notice is required to bring them to an end, thirty days in New York and some other states, one month or three months in other states.⁷ These statutes were enacted in apparent ignorance of the nature of tenancies at sufferance, and without any conception of the result which would follow the literal application of the provision. Every tenant could, by merely holding over without right, become a tenant by sufferance and thereby extend his term thirty days or three months, as the case might be, without the consent of the landlord under these statutes literally applied. Of course no such result was intended, and the courts have corrected the bungling error of the lawmakers by a bit of judicial legislation, holding that the tenancy at sufferance intended by the statute is a tenancy in which the tenant has held over so long as to give rise to the implication that the landlord is actually suffering or consenting to his holding, in effect a tenancy at will.⁸ The idea of laches on the part of the landlord seems to be involved, the courts stating that the holding over must be so long continued as to amount to laches on the landlord's part. A holding over of about three months has been held not sufficient to create such a tenancy within the meaning of the statute.⁹ Of course the ordinary tenancy at sufferance may be ended by entry without notice as at common law.¹⁰

7. N. Y. Real Prop. L., § 228; Missouri Rev. St. 1899, § 4110; Wisconsin Rev. St. 1898, § 1283. See, also, statutes of Michigan and Oregon, requiring three months' notice. See § 156, notes 2 and 3, *ante*, for the statutes requiring notice for tenancies at will.

In *Gruenator v. Morris*, 66 N. J. L. 114, the court held that the statute (Acts 1898, c. 228, § 109) requiring three months' notice by landlords to terminate a tenancy by sufferance, was repealed by Acts 1901, c. 39, and

Acts of 1903, c. 13, providing that "any lessee or tenant at will or by sufferance" may be removed by the District Court when any such person shall hold over after the tenancy expires and after demand and notice in writing for delivery of possession to the landlord.

8. *Smith v. Littlefield*, 51 N. Y. 539; *Rowan v. Lytle*, 11 Wend. (N. Y.) 617; *Meno v. Hoeffel*, 46 Wis. 262; *Irvine v. Scott*, 65 Ky. 260.

9. See cases in preceding note.

10. See note 8, *supra*.

E.—Covenants in Leases.

§ 159. **Nature and Effect.**—A lease, as we have seen, is primarily a conveyance or transfer of an estate from the landlord to the tenant. Though it need not be a contract, as a practical matter nearly every lease is also a contract, expressing the terms and conditions under which the estate transferred by the lease is held and enjoyed by the tenant. The express covenants of the lease, so called whether the lease be by parol or in writing, with or without a seal, are the promises made by the tenant to the landlord, as the covenant to pay rent, to make repairs, not to assign or sublet, and the like, and the promises made by the landlord to the tenant, as an express covenant of quiet enjoyment, covenant to repair, to renew the lease, etc. These covenants limit and define the relation of landlord and tenant between the parties, and therefore when that relationship is transferred to others, through an assignment of his leasehold interest by the tenant, or by a conveyance of the property subject to the lease by the landlord, the new landlord and the new tenant are bound by these covenants so limiting and defining the relationship, and the rights and obligations of the tenant under the lease. These covenants, therefore, “run with the land,” which means simply that they are the terms under which the leasehold estate was created and is held, and when the leasehold estate is assigned the assignee necessarily takes the term subject to the same covenants, and the grantee of the landlord necessarily takes the reversion subject to them as the terms of the tenure under which the tenant holds.¹

Implied covenants do not arise out of any contract, express or implied in fact, but are rather incidents of the relation of landlord and tenant imposed by law. They also “run with the land,” since they are binding incidents of the relationship of landlord and tenant which will bind the

1. See cases cited in notes following.

assignee of the tenant and the grantee of the landlord, as the old tenancy or term continues between the new parties. This question is more fully defined and illustrated in the discussion of Assignment and Subletting.²

§ 160. Implied Covenant of Quiet Enjoyment.—This is a covenant implied in law that the tenant shall not be disturbed in his quiet enjoyment of the leased property by any wrongful act of the landlord or of his successors in interest, or by the enforcement of any title superior to that of the landlord.³ Under the old cases it was held to be implied from the words “*demisi*” or “*concessi*,” or their equivalents, “*demise*” or “*grant*.”⁴ Under later cases words of letting of any kind were held sufficient, and the modern rule now prevailing in England, New York, and in nearly all the states is that the covenant will be implied from the mere relationship of landlord and tenant, no matter how that relationship arises or by what means it was created.⁵ The wrongful act of the landlord must amount to an eviction to give a cause of action for violation of this covenant. A mere trespass, however it may disturb the tenant, is not a breach unless it results in ousting the tenant from the

2. See Assignment and Subletting, *post*.

3. As this covenant does not arise from any agreement, express or implied, between the parties, it follows that it is in no true sense a covenant, but rather an arbitrary rule of law attaching to the status of landlord and tenant. It follows that the relationship of landlord and tenant alone, irrespective of the words used in the lease creating it, or whether such lease be by parol or in writing, is sufficient to give rise to this so-called “covenant.”

4. Andrew’s case, Cro. Eliz. 214; Spencer’s Case, 5 Coke 16.

5. Mayor, etc. of N. Y. v. Mabie, 13 N. Y. 360; Mack v. Patchin, 42 N. Y. 167; Duncklee v. Webber, 151 Mass. 402; Budd-Scott v. Daniel, 2 K. B. 351; Stott v. Rutherford, 92 U. S. 107.

In New Jersey and New Hampshire the purely technical rule that the covenant will be implied only in leases containing the words “*demisi*” or “*concessi*” or their equivalents, and not from the mere relationship of landlord and tenant still prevails. Mershon v. Williams, 63 N. J. L. 398; Cano v. Vanderveer, 34 N. J. L. 293; Lovering v. Lovering, 13 N. H. 513.

whole or some part of the premises leased.⁶ A nuisance maintained by the landlord on adjoining property, and for which he is responsible, will constitute a breach of this covenant if the tenant is so disturbed and interfered with in his enjoyment of the premises that he is forced to quit. He has been evicted by the wrongful act of the landlord.⁷ If he remains in possession, however, he can maintain no action or counterclaim for breach of this covenant, since he has not been evicted, his only remedy being an action for damages in tort based on the nuisance.⁸ If the nuisance is maintained or trespass committed by a stranger the landlord is not responsible for it, as there is no eviction by the landlord, even though the tenant has been forced to quit the premises. His only remedy is against the stranger.⁹ The landlord in such case has done nothing to disturb his quiet enjoyment. If the tenant is forced to quit the premises because the landlord has failed to supply heat in the case of a steam-heated apartment or office, heated by a central plant under the control of the landlord, the landlord is liable for breach of the implied covenant of quiet enjoyment, though he cannot be held in damages if the tenant remains in possession.¹⁰

6. *Snow v. Pulitzer*, 142 N. Y. 263; *Boreel v. Lawton*, 90 N. Y. 293; *Edgerton v. Page*, 20 N. Y. 281; *International Trust Co. v. Schumann*, 158 Mass. 281; *Roth v. Adams*, 185 Mass. 341; *Sherman v. Williams*, 113 Mass. 481, and cases in preceding note. Where the landlord induced a third party to start proceedings to restrain the tenant from using the premises for the purpose for which they were leased (skating rink) resulting in the tenant's ouster, the landlord was liable. *Williams v. Getman*, 114 App. Div. (N. Y.) 282.

7. *Dyett v. Pendleton*, 8 Cowen (N. Y.) 727; *Edgerton v. Page*, 20 N. Y.

281; *Boreel v. Lawton*, 90 N. Y. 293.

8. See preceding note.

9. *Gilhooley v. Washington*, 4 N. Y. 217; *Gardner v. Keteltas*, 3 Hill (N. Y.) 330; *Hyde v. Wilmore*, 14 Misc. (N. Y.) 340; *Kimball v. Grand Lodge, etc.*, 131 Mass. 59.

10. *Jackson v. Paterno*, 128 App. Div. (N. Y.) 473; *affirming*, 58 Misc. 201. The court held that in the absence of any express covenant on the part of the landlord to supply heat, none would be implied in fact from the fact that the apartment was not provided with means for heating except by radiators connected with a heating system under the sole control

§ 161. **Further Incidents of Covenant of Quiet Enjoyment; Covenant of Power to Demise.**—Ousting of a tenant through the assertion of a title paramount to the landlord's is a breach of the implied covenant of quiet enjoyment, this covenant including an implied covenant of power to demise on the part of the landlord.¹ An express covenant that the tenant shall not be disturbed by acts of the lessor or those claiming through him takes the place of the implied covenant, and by implication excludes the implied covenant of title or power to demise, so that under a lease containing such a covenant the tenant cannot maintain an action for an eviction resulting from the enforcement of a paramount title.² The parties may prevent the implied covenant from arising by a stipulation to that effect,³ or they may modify

of the landlord; but as the furnishing of such heat by the landlord was essential to the enjoyment of the apartment, his failure to furnish adequate heat, rendering the apartment unfit for occupancy, would justify the tenant in moving out, amounting to an eviction though the wrongful default of the landlord, for which he would be liable; as the tenant did not move out, the court held that no action would lie. It is hard to see how the failure of the landlord to supply heat could amount to a default or wrongful act unless he had contracted, expressly or impliedly, to furnish heat. It seems clear that a contract to supply heat should be implied in such case from the facts; it is impossible to escape from the conclusion that the parties, as reasonable men, could have intended nothing else.

1. *Mayer, etc., of N. Y. v. Mabie*, 13 N. Y. 151; *Mack v. Patchin*, 42 N. Y. 167; *Holbrook v. Young*, 108 Mass. 83; *King v. Bird*, 148 Mass. 572.

In New Jersey the rule that the

covenant of power to demise will be implied only from the words "*demisi*" or "*concessi*" or their equivalents, laid down in *Gano v. Vanderveer*, 34 N. J. L. 293, would seem to be only part of the broader rule, still the law in that state that the covenant of quiet enjoyment will be implied only where such words are used. *Mershon v. Williams*, 63 N. J. L. 398.

2. An express covenant of quiet enjoyment "without molestation or disturbance from the lessor, his successors or assigns" was held to exclude the usual implied covenant, so that the landlord was not liable when the tenant was ousted through foreclosure of a prior mortgage, in *Burr v. Stenton*, 43 N. Y. 462.

In England the implied covenant of quiet enjoyment is a covenant against acts of the landlord and those claiming through him, and does not include ouster through failure of title. *Jones v. Lavington*, 1 K. B. 253.

3. *Malder v. Carondelet*, 26 Mo. 112.

the implied covenant in any way they please, by express provision. An express covenant against eviction by the wrongful acts of the landlord is such a modification, and excludes by implication the implied covenant of title which would otherwise form part of the covenant of quiet enjoyment.⁴

The tenant cannot maintain an action for breach of the covenant of quiet enjoyment arising out of the landlord's failure of title until he has been evicted. He may be evicted within this rule either by an actual ouster as the result of an ejectment suit, or by attorning to the superior owner as his tenant, or by peacefully yielding possession to him, and he may so attorn or yield possession without waiting for the commencement or prosecution of a suit, in case such adverse title is really paramount to that of the landlord.⁵ In either case the eviction of the tenant from his interest under the original lease is complete.

The eviction of the tenant from the use and enjoyment of an incorporeal right in the nature of an easement given him expressly or impliedly as part of the thing leased, is a breach of this covenant for which an action will lie. Thus the tenant of an office or apartment with windows opening on an open court or back yard or alley, part of the lot on which the building stands, acquires under his lease the right to light and air from such open space, and may assert an eviction if such open space is built upon or enclosed so as to shut off light and air. The tenant is deprived of part of the thing leased, and may hold the landlord for breach of this covenant.⁶ The same result follows where the land-

4. *Burr v. Stenton*, 43 N. Y. 462.

5. *King v. Bird*, 148 Mass. 572; *Morse v. Goddard*, 13 Metc. (Mass.) 177; *Lawrence v. French*, 25 Wend. (N. Y.) 443.

6. *Doyle v. Lord*, 64 N. Y. 432; *Myers v. Gemmel*, 10 Barb. (N. Y.) 537; *Morgan v. Smith*, 5 Hun (N. Y.) 220; *Story v. Iden*, 12 Mass. 157;

Case v. Minot, 158 Mass. 577. In *Brown v. Holyoke Water Power Co.*, 152 Mass. 463, the cutting off of water power which the landlord agreed to furnish was held to be an eviction from part of the thing leased; the contract to furnish power was treated as an incorporeal right granted with the premises.

lord in such cases prevents the tenant from using the halls or elevators, and if the tenant is in this way deprived of access to the rooms leased the eviction is entire.⁷ But the leasing of stores or apartments in a building creates no right to light and air from an adjoining parcel of land not appropriated to the building, though it belong to the landlord, since no easement of light and air arises by implied grant in favor of a grantee or tenant of a building over adjoining land of the grantor or landlord not conveyed or leased with the building.⁸ The taking of the leased premises under the power of eminent domain is not a violation of the covenant, since there is no wrongful act on the part of the landlord nor any failure of his title. The tenant is entitled to compensation for his interest in the proceedings for condemnation, in connection with which the value of the interest of each having an estate in the property is determined and a proper award made.⁹

When, under the police power of the state, a leased building is torn down as unsafe, the tenant has no action for breach of the covenant of quiet enjoyment, there being no wrongful act or failure of title on the part of the landlord.¹⁰ But if the building is condemned because of the failure of the landlord to make it safe under an ordinance requiring him to do so, he is liable for breach of this covenant since the eviction is the proximate result of his default.¹¹

7. *Hall v. N. Irvin*, 78 App. Div. (N. Y.) 107; *Eschman v. Atkinson*, 91 N. Y. Supp. 319; *Stevens v. Salmon*, 39 Misc. (N. Y.) 159. See cases in preceding note, involving same principle, also *Jackson v. Paterno*, 58 Misc. (N. Y.) 201.

8. *Myers v. Gemmel*, 10 Barb. (N. Y.) 537, and cases cited.

In New Jersey, following the English rule, such an easement arises by

implied grant. *Ware v. Chew*, 43 N. J. Eq. 493.

9. *Folts v. Huntley*, 7 Wend. (N. Y.) 210; *Ellis v. Welch*, 6 Mass. 246; *Goodyear Co. v. Boston Terminal Co.*, 176 Mass. 115.

10. *Connor v. Bernheimer*, 6 Daly (N. Y.) 295; *Burke v. Tindale*, 12 Misc. 31, 32, aff'd. 155 N. Y. 673.

11. *Lindwell v. May*, 111 App. Div. (N. Y.) 457; *Kansas Inv. Co. v. Carter*, 160 Mass. 421.

The landlord is bound to prevent foreclosure of a prior mortgage or other lien affecting the premises at the time the lease was made. The question of whether the ouster of the tenant by foreclosure of such a prior lien is the result of the wrongful act or default of the landlord, or arises from the enforcement of a paramount title, is a close and interesting one, but whichever view is taken the result is the same—the landlord is liable for breach of the covenant of quiet enjoyment.¹² It is submitted that in case of an express covenant against acts of the landlord and his successors in interest, excluding the implied covenant of power to demise by implication, the landlord would also be liable, because the ouster of the tenant results from his failure to protect the tenant by preventing foreclosure, in violation of his duty under the lease. He clearly has power to demise the premises, and therefore there would seem to be no breach of his covenant of power to demise.¹³

The covenant of quiet enjoyment, being an incident of the relationship of landlord and tenant, continues only so long as the relationship continues, and therefore comes

12. *Mack v. Patchin*, 42 N. Y. 167; *Dunklee v. Webber*, 151 Mass. 408; *Fitchburg Mfg. Corp. v. Melven*, 15 Mass. 268.

The landlord is bound to pay interest on mortgages and other incumbrances, taxes and assessments, so that the tenant may not be interfered with in his possession and enjoyment. *Mayer v. Cashman*, 10 Johns. (N. Y.) 16; *Darcey v. Steger*, 23 Misc. (N. Y.) 145. The tenant may pay such charges and hold the landlord therefore. *Watson v. Home*, 7 B. & C. 285.

13. In *Burr v. Stenton*, 43 N. Y. 462, the court takes the position, however, that such express covenant of quiet enjoyment "without molestation or disturbance from the lessor,

his successors or assigns," excludes eviction through failure of title, so that the landlord was not liable for the ousting of a tenant by foreclosure of a prior mortgage. On the other hand, in *Mack v. Patchin*, 42 N. Y. 167, though the court refers to such ouster as resulting from a failure in the landlord's title, the landlord was held liable in full damages because of his wrongful default in not preventing foreclosure, and not merely for rent advanced and mesne profits which the tenant is liable to pay over, which is the measure of damages in cases where the tenant is ousted through the enforcement of a paramount title without willful wrong on the part of the landlord.

to an end, if the landlord has a limited estate, on the termination of the landlord's estate. Thus if the landlord is a life tenant, on his death the tenant's estate ends, provided the lease was made by the life tenant, as the term for years cannot be greater than the life estate out of which it was created. As the tenant for life had a sufficient estate to create and transfer a term of years, it follows that there is no breach of the implied covenant of power to demise. The covenant of quiet enjoyment ends with the life estate, the termination of which brings to an end the relation of landlord and tenant between the parties.¹⁴ Under an express covenant, however, the estate of the deceased life tenant would be liable in such case.¹⁵

§ 162. Damages for Breach of Covenant of Quiet Enjoyment.—In the usual case of eviction by wrongful act of the landlord the tenant may recover all damages proximately resulting, including the full value of the unexpired term.¹

14. *Swan v. Stransham*, 3 Dyer's Reps. 257, A; *Baynes & Co. v. Lloyd & Sons*, 1 Q. B. 820; *Woodhouse v. Jenkins*, 9 Bing. 421 (no breach, tenancy ended by termination of landlord's estate tail). There is no implied covenant that the landlord's title is in fee simple, free from limitation or condition, mortgage or other lien. The implied covenant of power to demise included within the implied covenant of quiet enjoyment is merely that the landlord has sufficient title to make the lease in question, not that his estate is free of any limitation, condition or lien which may bring the tenancy to an end before the expiration of the term. It would seem to follow, in the absence of an express covenant, that the landlord would not be liable if his estate be upon limitation or conditional limitation, and is brought to an end by

the happening of the contingency on which it depends. If his estate be upon condition, and is forfeited for breach thereof by the landlord, or by the enforcement of a mortgage or other lien, the tenant is ousted through the wrongful act of the landlord, who is liable in full damages, as we have seen. See notes 12 and 13, *supra*. See, also, *Stevenson v. Powell*, 1 Bulet. 182, in which case reentry by superior landlord because of underlessor's default in payment of rent was held to be a breach. For the same reasons a tenant from year to year has no action against his lessor, a tenant for years, on the expiration of the lessor's term. *Penfield v. Abbott*, 32 L. J. Q. B. 67.

15. See cases in note preceding.

1. *Lock v. Furze*, L. R. 1 C. P. 441; *Dexter v. Manley*, 4 Cush. (Mass.) 14; *Snow v. Pulitzer*, 142 N. Y. 263.

In case the tenant is ousted by the enforcement of a paramount title, the rule which generally prevails is the same, viz.: full damages including the value of the term over and above the rent reserved.² In New York, Ohio and Pennsylvania, however, the rule is established that if the paramount title is enforced without wrong toward the tenant on the landlord's part, he having made the lease in good faith with reason to believe his title good, he will be liable only for rent advanced and for the mesne profits which the tenant may be compelled to pay over to the owner of the paramount title, excluding the value of the leasehold estate.³ This rule follows the rule established in England and in several states that an innocent vendee of realty who finds that he cannot transfer a good title because of some hidden defect, cannot be held for the value of the contract, but only for such part of the purchase price as has been advanced to him by the purchaser, the expense of making a search and closing the contract of sale thus putting the parties *in statu quo*.⁴

§ 163. Implied Covenant to Give Possession.—On the making of a lease, whether by parol or in writing, the landlord impliedly covenants to permit the tenant to take possession at the time fixed for the beginning of the term. The failure of the landlord to give possession, either through his wilful exclusion of the tenant or by failure of

Loss of prospective profits cannot be recovered, as being too indefinite. *Dennison v. Ford*, 10 Daly (N. Y.) 412; *Cleveland, etc. R. Co. v. Mitchell*, 84 Ill. App. 206. See § 163, *post*, and cases cited.

2. *Lock v. Furze*, L. R. 1 C. P. 441; *Dexter v. Manley*, 4 Cush, 14; *Dobbins v. Duquid*, 65 Ill. 464. In *Maas v. Kramer*, 52 Misc. (N. Y.) 151, the sublessor made a sublease extending beyond his own term; the

sublessee got a further lease from the original landlord. Held sublessor not liable because the sublessee made it impossible for him to get a renewal from the original landlord.

3. *Matter of Strasburger*, 132 N. Y. 128; *Mack v. Patchin*, 42 N. Y. 167; *Lanigan v. Kille*, 97 Pa. St. 120; *McAlpin v. Woodruff*, 11 Oh. St. 120.

4. See *Mack v. Patchin*, 42 N. Y. 167, and cases cited therein.

his title, is treated in most cases as a breach of the covenant of quiet enjoyment, though no actual eviction is involved.⁵ These cases are sound since the keeping of the tenant out of possession amounts to an eviction, as in the case of joint tenants and tenants in common, it being held that the keeping of one tenant out of possession by his cotenant in those cases amounts to an eviction.⁶ The tenant is not bound to take possession later, or to sue the landlord in ejectment, but may treat the lease as at an end and may sue the landlord for breach of the implied covenant.⁷ The measure of damages is the value of the term, viz.: the value of the leasehold interest over and above the rent reserved, together with any rent paid in advance. To this is added such loss arising from reasonable preparation made by the tenant to take possession and other damages proximately resulting from the breach, exclusive of expected

5. *Friedlander v. Myers*, 139 N. Y. 432; *Garrison v. Huttin*, 118 App. Div. (N. Y.) 455; *Edelsheimer v. Quackenbush*, 68 Hun (N. Y.) 427; *Riley v. Hale*, 158 Mass. 240; *Berrington v. Casey*, 78 Ill. 317.

The nature of the tenant's interest before entry and before the beginning of his term under the lease, called the tenant's *interesse termini*, is not clearly expressed in the authorities. It is clear that he has a future estate, a vested chattel interest to vest in possession on the day fixed for the beginning of the term. This future interest gives him an absolute right to the property when the first day of his term is reached, as in the case of a remainder after a life estate, or any other vested future estate. He may, therefore, recover the property from the landlord if the landlord wrongfully withholds possession (*Trull v. Granger*, 8 N. Y. 115; *Becar v. Flues*,

64 N. Y. 518) but he is not obliged to do so; he may sue for breach of the covenant of quiet enjoyment, treating the lease as at an end. (See cases cited above.)

The landlord is bound to keep the premises in repair, or to rebuild in case buildings are destroyed during the interval before the term arises, and must give possession of the property to the tenant in substantially the condition in which it was at the time the lease was made. *Wood v. Hubbell*, 10 N. Y. 480, 487; *Meeks v. Ring*, 51 Hun (N. Y.) 329 (dicta). See, also, *Edwards v. McClain*, 122 N. Y. 302.

6. See § 214, *post*.

7. See cases in note 5, *supra*; also to same effect, *Rothman v. Kosower*, 48 Misc. (N. Y.) 538; *Goerl v. Dammrauer*, 27 Misc. (N. Y.) 555; *Bernhard v. Curtis*, 75 Conn. 476.

profits as the parties might reasonably expect to follow from such a breach by the landlord.⁸

The landlord is not obliged to oust a stranger who may have taken possession wrongfully during the time intervening before the beginning of the leasehold estate, nor a tenant who holds over wrongfully. The tenant may recover the leased property in either case, since his ownership of the property by virtue of the lease gives him the right to recover and retain possession against any person wrongfully holding the property, including the landlord. The act of the stranger or the tenant wrongfully holding over is not the landlord's act, nor is there any failure of his title, so that the tenant cannot hold him on the implied covenant of quiet enjoyment.⁹

§ 164. Implied Covenant to Repair.—The matter of repairs is usually covered by an express covenant, so that cases involving the duty of the tenant to repair, in the absence of express covenant, are not numerous. We have

8. *Friedlander v. Myers*, 139 N. Y. 432, and cases therein cited.

9. *Gardner v. Keteltas*, 3 Hill (N. Y.) 330; *Sullivan v. Schmidt*, 93 App. Div. (N. Y.) 469.

In New York city, by statute a monthly tenant cannot be ousted except on notice of five days given before the end of the month (except where month ends on May 1st). In a case where the landlord failed to give this notice and therefore failed to oust the tenant until over a month had elapsed from the time the lease to the plaintiff was to take effect, the plaintiff recovered against the landlord for breach of the implied covenant, the landlord having failed to give the required notice to the former tenant. *Goerl v. Damrauer*, 27 Misc. (N. Y.) 555. The soundness of this de-

cision depends on whether the monthly tenant holds over as a matter of right as tenant for another month, when the notice of five days has not been given, and the case would seem to be an authority, by necessary implication, for that proposition. The statute requires such notice only as a condition precedent to dispossess proceedings. The tenant's interest, being for a month certain, comes to an end at the end of the month, though no notice be given, and the tenant holds over as a wrongdoer, and should be liable as such to the landlord, or new tenant, either of whom could maintain ejectment, though barred from summary proceedings because of the failure to give notice.

seen heretofore that tenants for years and from year to year, from month to month, etc., are liable for permissive waste.¹ In the absence of express covenant the law implies a covenant on the part of every tenant not to commit permissive waste and his implied covenant to repair is therefore merely a promise implied by law that he will make such repairs as will prevent the premises from falling to ruin and decay, reasonable repairs which will keep the premises wind and water tight, and which will preserve the property substantially in the condition it was in when the tenancy arose, depreciation from ordinary wear and tear during the term being excepted. A tenant is therefore required to repair or replace broken windows or doors, repair leaking roofs, restore boards or other side covering in any case where such siding has been destroyed or removed so as to leave the frame and interior of the building unprotected.² He is also required to keep in tenable or working condition the plumbing, heating plant, and any other part of the thing demised.³ In the absence of express covenant he is not obliged to rebuild or restore a building destroyed by fire, or by storm or the public enemy, or a building which has become so ruinous from ordinary wear and tear and the gradual action of the weather, in spite of the making of the reasonable repairs required of the tenant, that it is not capable of further repairs as such, but can only be rebuilt.⁴ The same rule applies to any substantial

1. See § 66, *ante*.

2. *Co. Litt.*, 53a; *Suydam v. Jackson*, 54 N. Y. 450; *United States v. Bostwick*, 94 U. S. 53; *Moore v. Townshend*, 33 N. J. L. 284; *Newbold v. Brown*, 44 N. J. L. 266; *Kearnes v. Cullen*, 183 Mass. 298; *Earle v. Arbogast*, 180 Pa. St. 409; *Junction Min. Co. v. Springfield, etc. Co.*, 222 Ill. 600; *Lynch v. Sauer*, 16 Misc. (N. Y.) 1; *Forrester v. O'Rourke Eng. Co.*, 48 Misc. 390; *Hatch v. Stamper*, 42 Conn. 28.

3. *Russell v. Rush*, 2 Pittsh. Rep. (Pa.) 134. See, also, *Thalheimer v. Lempert*, 17 N. Y. State Repr. 346, holding that the tenant need not make such repairs of the plumbing and heating outfit out of repair when the lease began.

4. *Ferguson v. —*, 2 Esp. 590; *Suydam v. Jackson*, 54 N. Y. 450; *Earle v. Arbogast*, 180 Pa. St. 409; *Junction Min. Co. v. Springfield, etc. Co.*, 222 Ill. 600.

part of a building, such as the roof, or a side wall. If after making ordinary repairs by patching the roof or side walls it becomes in course of time from inevitable deterioration in such bad condition that nothing can be reasonably or successfully done except to rebuild or restore the roof or wall, by a new covering of shingles, boards, concrete, or the like, a tenant is not required so to restore or rebuild, in the absence of an express covenant.⁵

A tenant is bound to repaint only so far as such repainting is required to preserve the building from deterioration through action of the weather, not to preserve its appearance and market value as of the time when the lease arose.⁶ Under the implied covenant as well as under the general express covenant to repair, a tenant is bound merely to maintain the premises in the condition in which he finds them, reasonable wear and tear excepted; he is not obliged to correct defects existing when the lease begins, nor is he responsible for permanent damages to the building resulting therefrom.⁷

Under this implied covenant a tenant of agricultural lands is bound to use them in a husbandlike manner so as to maintain their fertility, and to repair and maintain fences. The measure of his duty is that he shall not be guilty of waste with respect to these matters.⁸

5. See cases in preceding note, also *Street v. Central Brewing Co.*, 101 App. Div. (N. Y.) 3, and *May v. Gilles*, 169 N. Y. 330, applying the same rule to express covenants to repair.

6. *Monck v. Noyes*, 1 Car. & P. 265.

In New Jersey it is stated that a life tenant must make all repairs required, not excepting ordinary wear and tear; if a new roof is needed he is bound to put it on; if paint wears off he is bound to repaint. *Matter of Steele*, 19 N. J. Eq. 120. If this expresses the rule applying to tenants

for years in New Jersey it is out of accord with the rule generally prevailing.

7. *Thalkheimer v. Lempert*, 17 N. Y. St. Repr. 346; *White v. Albany R. Co.*, 17 Hun (N. Y.) 98, holding that the same rule applies to express general covenants for repairs. *Steefel v. Rothchild*, 64 App. Div. 293 (reversed on another point).

8. *Sarles v. Sarles*, 3 Sandf. Ch. (N. Y.) 601; *Whitfield v. Weedon*, 2 Chitty 685. See "Waste," *ante*.

It is quite immaterial what the cause of the defective condition requiring repairs may be, whether the act of a stranger, of storm or tempest, or the wrongful or negligent act of the tenant. In each case he is bound to repair if such repairs are necessary to prevent deterioration and decay not resulting from ordinary wear and tear.

§ 165. Express Covenants to Repair.—A general covenant by the tenant to make all necessary repairs and to return the premises to the landlord at the end of the term in as good condition as when the lease was made, reasonable wear and tear excepted, requires the tenant to make all repairs necessary to maintain the premises in the same state of repair as at the beginning of the term. He is not required to put the premises in repair at the beginning of the term, nor to make repairs at any time which will put the premises in a better state of repair than when the tenancy arose.¹

But if the tenant also covenants to put the premises in good repair, and maintain them in good repair during the term, all repairs must be made by the tenant necessary to accomplish this result.² A covenant to keep the premises in good repair is construed as necessarily involving a covenant to put them in good repair if such is not their condition at the beginning of the term, since they cannot be maintained in good repair unless they are first put in that condition.³

1. *Walker v. Hatton*, 10 M. & W. 258; *White v. Albany R. Co.*, 17 Hun (N. Y.) 98; *Lockrow v. Horgan*, 58 N. Y. 635, and cases in following notes. In the *White Case*, *supra*, the court said that the parties intend to lease the buildings as they are, and rent is fixed on that basis; that a covenant to *put* in repair so as to restore the premises in *better* repair

than they were in when leased, must be express and clear, as contrary to the usual intent.

2. *Lockrow v. Horgan*, 58 N. Y. 635; *Street v. Central Brew. Co.*, 101 App. Div. (N. Y.) 3; *Markham v. David Stephenson Brewing Co.*, 104 App. Div. 420.

3. *Sauer v. Belton* 7 Ch. Div. 815; *Appleton v. Marx*, 117 App. Div. (N.

The English rule, followed in several states, is that a covenant to repair requires the tenant to rebuild the whole or any part of a building on the leased premises which has been destroyed in whole or in part by fire, storm, or in any other way, whether through inevitable accident, the act of a stranger, or by the tenant's wrongful act or default.⁴ In New York, however, and some other states the courts construe the covenant to make repairs as not extending to the rebuilding of a structure or of a substantial part thereof, such as a side wall, or a roof; that such rebuilding does not come within the meaning of the term "repairs" as used in the tenant's covenant.⁵

The tenant's duty to make repairs, whether under the express or the implied covenant is in no way affected by the causes that make repairs necessary, whether by fire,

Y.) 206; *Lehmaier v. Jones*, 100 App. Div. 495; *Myers v. Burns*, 35 N. Y. 271.

Such a covenant does not, of course, require the making of improvements, as the erecting of new buildings. *Naye v. Noezel*, 50 N. J. L. 523, or the putting in of a new electric elevator instead of an old hydraulic elevator capable of repair. *Appleton v. Marx*, 117 App. Div. 206.

4. *Bullock v. Dommitt*, 6 Term. R. 650; *Ely v. Ely*, 80 Ill. 532; *Leavitt v. Fletcher*, 92 Mass. 119, the court saying: "The express covenant to repair binds the covenantor to make good any injury which human power can remedy, even if caused by storm, flood, fire, inevitable accident or the act of a stranger." See, also, *Gettysburg Elec. R. Co. v. Electric Light, etc. Co.*, 200 Pa. St. 372; *Beach v. Crain*, 2 N. Y. 87; *School Trustees of Trenton v. Bennett*, 27 N. J. Eq. 513.

5. *May v. Gilles*, 169 N. Y. 330;

Street v. Central Brewing Co., 101 App. Div. (N. Y.) 3; *Ducker v. Del Genovese*, 93 App. Div. 575 (in which case the court held that an express covenant made in the strongest form to cover all repairs did not require a tenant to rebuild a building which collapsed because of a structural defect. But see *Beach v. Crain*, 2 N. Y. 87, *contra*). *Wattles v. South Omaha, etc. Co.*, 50 Neb. 251.

In the absence of an express covenant or agreement covering the matter, changes or improvements required by public authorities, such as drains, sewers, paving, removal of encroaching stoops, etc., must be made at the expense of the landlord, not coming within a covenant to repair and to comply with orders of the health, building or other city departments. *Lindwall v. May*, 111 App. Div. (N. Y.) 457; *City of N. Y. v. U. S. Trust Co.*, 116 App. Div. 349.

storm, inevitable accident, or the tenant's wrongful act or neglect, or the act of a stranger.⁶

In New York and some other states statutes have been enacted providing that if the leased premises are destroyed or rendered uninhabitable by fire or other action of the elements or from any other cause the tenant may at his election quit the premises and end the lease. Under the statute, in the absence of an express covenant, if the leased building is destroyed by fire or by storm or by some sudden and unusual action of the elements in the nature of a catastrophe, the tenant is not only not bound to rebuild or restore the building, but he may end the term by moving out and thus free himself from the obligation of paying any further rent.⁷ If the untenable condition results from the tenant's failure to make the repairs which he is required by law to make, he cannot claim the benefits of this statute.⁸

Express covenants to repair, or to put in repair or keep in good repair by the landlord bind the landlord just as similar covenants by a tenant bind the tenant, and are governed by the same general rules.⁹ Since the tenant is in possession and in a position to discover the need of repairs, the landlord's liability is subject to a condition precedent that the tenant give him notice of the need of repairs.¹⁰ If

6. *Leavitt v. Fletcher*, 92 Mass. 119; *Lockrow v. Horgan*, 58 N. Y. 635; *Ashby v. Ashby*, 59 N. J. Eq. 547.

7. *Syndham v. Jackson*, 54 N. Y. 450; *May v. Gilles*, 169 N. Y. 330; *Messerole v. Hoyt*, 161 N. Y. 59; *Hatch v. Stamper*, 42 Conn. 28.

In *May v. Gilles*, *supra*, part of the glass roof of an extension to the main building gave way because of a heavy fall of snow, and twenty-five feet of the extension had to be taken down because unsafe. The court held that

the statute applied, and the tenant was freed from the obligation to pay rent and was not required to repair.

8. See cases in preceding note.

9. *Torrens v. Walker*, 2 Ch. 166; *Myers v. Burns*, 35 N. Y. 269. Where the landlord has not agreed to make repairs the mere fact that he has made certain repairs voluntarily does not bind him to make other repairs. *Galvin v. Beals*, 187 Mass. 250.

10. *Thomas v. Kingsland*, 108 N. Y. 616; *Gergebeck v. Lord*, 33 N. J. L. 240; *Marley v. Wheelright*, 172 Mass.

after such notice the landlord fail within a reasonable time to make the repairs, the tenant may make them and recover the cost thereof from the landlord.¹¹ The tenant may, however, refuse to make such repairs where extensive repairs are required, and hold the landlord for damages, which are measured by the difference between the rental value of the premises in repair and the rental value as out of repair.¹² It is well settled that the tenant cannot recover for personal injuries to himself or a member of his family arising from a defective condition of the premises due to the landlord's failure to repair under his covenant, since such damages do not proximately result from the breach.¹³ The same rule applies to damages to goods or chattels of the tenant injured because of such defects.¹⁴ If the tenant con-

530; *Hutchinson v. Cummings*, 156 Mass. 329.

Where the landlord knew of the need of repairs, having created through his unjustified use of the roof the defective condition which made them necessary, notice was not required since he knew or should have known that repairs were necessary. *Pratt, Hurst & Co. v. Tailer*, 186 N. Y. 417.

11. *Markham v. David Stevenson Brew. Co.*, 111 App. Div. (N. Y.) 178. Here the tenant covenanted to repair, and the landlord made repairs after default by the tenant, and recovered the cost thereof.

12. *Thompson-Houston Elec. Co. v. Durant, etc. Co.*, 144 N. Y. 34; *Myers v. Burns*, 35 N. Y. 269; *Hexter v. Knox*, 63 N. Y. 561.

13. *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 169; *Schick v. Fleischhauer*, 26 App. Div. (N. Y.) 210; *Golob v. Pasinsky*, 72 App. Div. 176; *Frank v. Mandel*, 76 App. Div. 413; *Van Tassel v. Read*, 36 App. Div. 529.

14. *Cook v. Soule*, 56 N. Y. 420; *Reiner v. Jones*, 38 App. Div. 441; *Weinberg v. Ely*, 114 App. Div. 857.

In *Pratt, Hurst & Co. v. Tailer*, 186 N. Y. 417, the lease provided that the landlord should not be liable for damages from leaks until a reasonable time after receiving notice of the need of repairs, clearly implying that the landlord assumed such liability in case of his failure to repair under his covenant. The landlord's liability for damages to the tenant's goods in case the giving of notice was not required seems to have been conceded on both sides and this question of damages was not discussed, the court holding that notice to the landlord was not required since he knew of the defective condition of the roof, having used the roof in an improper way, causing the defects which required repairs. It is not an authority that damages for loss of goods can be recovered for breach of the usual covenant to repair on the part of the landlord.

In *Rauth v. Davenport*, 60 Hun (N.

tracted with some carpenter or general contractor to make all necessary repairs, it is clear that damage to the tenant's person or property would not be included as damages proximately resulting from a breach of the contract to make repairs. It is submitted that as the landlord is under no duty to repair apart from his contract, the situation is exactly analogous, and the landlord should not be held liable for such damages arising from injuries to the person or property of the tenant resulting from the defective condition which the landlord failed to repair, since such damages are not the proximate result of the breach of contract, or contemplated as possible damages when the contract was made. It is clear that, for like reasons, the landlord cannot be held under this covenant for damages which the tenant may have been compelled to pay to a third person for injuries resulting from such defective condition.¹⁵ Loss of profits by the tenant because of failure to repair is not recoverable, because too speculative and not proximately re-

Y.) 70; *Levy v. Roosevelt*, 131 App. Div. (N. Y.) 11; *Phillips v. Ehrmann*, 8 Misc. (N. Y.) 39, and *Valentine v. Woods*, 59 Misc. 471, the damages to the tenant's goods resulted from a defective condition of the roof or other part of the premises retained by the landlord and for the condition of which he was responsible, the tenant having leased only a part of the building. Such damages, resulting from the failure of the landlord to maintain the part of the premises retained by him in safe condition, the tenant having no right or power to make the repairs himself, may be recovered from the landlord, since they are the proximate result of the landlord's failure to use due care in the maintaining of his property in safe condition, whether or not he has

promised to make such repairs. In any case the tenant cannot recover damages if he wilfully or negligently exposes his goods to a danger, such as from leakage of a roof, which he could reasonably have avoided.

Where the defects are in the premises leased and can be repaired with little trouble and expense, the tenant should reduce damages by making the needed repairs, and the measure of damages would be the cost of the repairs, whether actually made by the tenant or not. For *dicta* sustaining this rule, which is manifestly sound, see *Cook v. Soule*, 56 N. Y. 420; citing *Miller v. Mariner's Church*, 7 Green 57; *Laker v. Damon*, 17 Pick. 284. See, also, *Weinberg v. Ely*, 114 App. Div. (N. Y.) 857.

15. See § 173, *post*.

sulting,¹⁶ but an exception is made where a hotel, boarding house or the like is leased to be operated as a hotel or boarding house; damages resulting from inability to get lodgers or guests on account of the landlord's failure to repair under his covenant may be recovered against him as damages proximately resulting from the breach.¹⁷

§ 166. No Implied Covenant of Fitness for Use.—The law gives rise to no covenant that the leasehold premises are reasonably fit for the uses for which they were rented. A tenant is the purchaser of an estate in the land. The general rule of *caveat emptor* applies to him as it applies to purchasers of land for life or in fee. In the absence of an express warranty of the condition of the premises the tenant takes them as they are, assuming all the risk as to their fitness for his purposes.¹ Of course if he has been led into taking the lease by false statements of fact as to the condition of the property made by the landlord with knowledge of their falsity, actual or implied, the tenant may rescind on

16. *Drago v. Mead*, 30 App. Div. (N. Y.) 258; *Derwin v. Potter*, 5 Denio (N. Y.) 306.

17. *Gulliver v. Fowler*, 64 Conn. 556; *Myers v. Burns*, 35 N. Y. 269; *Hexter v. Knox*, 63 N. Y. 561.

1. *Hart v. Windsor*, 12 M. & W. 68; *Naumberg v. Young*, 44 N. J. L. 331; *Stevens v. Pierce*, 151 Mass. 207; *Jaffe v. Harteau*, 56 N. Y. 398; *Casey v. Kreizer*, 26 Misc. (N. Y.) 755; *Daly v. Wise*, 132 N. Y. 306; *Franklin v. Brown*, 118 N. Y. 110, and cases cited therein. In *Smith v. Marrable*, 11 M. & W. 5, it was held that under a lease of a furnished dwelling for six weeks at the sea shore, a covenant would be implied that the premises were in a habitable state. The tenant was held

justified in leaving the premises and rescinding the lease, the premises being uninhabitable because of bugs.

This rule is limited in England to leases of furnished houses or apartments for short terms. *Hart v. Windsor*, 12 M. & W. 68; *Wilson v. Finely-Hatten*, 2 Exch. Div. 336; *Smith v. Marrable* was followed in Massachusetts. *Ingalls v. Hubbs*, 156 Mass. 348.

In the other states the rule laid down in *Smith v. Marrable* has been repudiated or criticized. It has been adopted in no state other than Massachusetts. *Franklin v. Brown*, 118 N. Y. 110; *Daly v. Wise*, 132 N. Y. 306; *Murray v. Albertson*, 50 N. J. L. 167.

the ground of fraud, and may recover any damages he may have sustained as a result, or both.²

It is well settled that the concealing by the landlord of hidden defects which he ought in good faith to disclose to the tenant, and of which he has knowledge or ought to have knowledge, will make him liable in fraud to the tenant for any damages proximately resulting,³ and by the weight of authority failure to disclose to the tenant a hidden defect dangerous to the tenant is actionable negligence provided the landlord knew or ought to have known of the existence of the defect.⁴ It would seem that the action of fraud sufficiently covers the situation, and provides the tenant with an adequate remedy. A willful concealment by the landlord is, of course, a wilful fraud. A negligent failure to disclose the defect, of which the landlord has actual or constructive knowledge, is also fraud for which he is liable, since it is a concealment of a fact which he is in good faith bound to disclose, and he is liable in an action of fraud and deceit whether his failure resulted from forgetfulness, negligence or was deliberately intended. The

2. See cases in preceding note, also, *Meyers v. Rosenback*, 5 Misc. (N. Y.) 337; *Miller v. Thorndike*, 103 Mass. 382.

Though the tenant stay in possession, affirming the lease, he can still maintain an action for damages in tort arising out of the fraud. *Whitney v. Allaire*, 1 N. Y. 305; *Harrington v. Douglas*, 181 Mass. 178; *Clogston v. Martin*, 182 Mass. 469.

3. *Caesar v. Karuty*, 60 N. Y. 229; *Minor v. Sharon*, 112 Mass. 477; *Cutler v. Hamlin*, 147 Mass. 471 (in three preceding cases the hidden defect was infection of premises with contagious disease. Landlord held liable for personal injuries resulting through contracting of disease); *Steeffel v. Rothchild*, 179 N. Y. 273 (landlord

held liable for failure to disclose to tenant dangerous condition of building which caused public authorities to condemn it shortly after tenant's entry, measure of damages being rent paid in advance and cost of moving fixtures, stock, etc.); *Simasack v. Morey*, 196 Ill. 569; *Boggard v. Gale*, 205 Ill. 511; *Maywood v. Logan*, 78 Mich. 135.

4. See Massachusetts and Illinois cases in preceding notes. In New York and some of the other states the principle of negligence as applying to these cases has not been clearly recognized, the cases turning on the landlord's fraudulent concealment. On either theory the landlord's liability is undoubted.

theory of negligence is based on the principle applying to a vendor of a tool or other chattel in dangerous condition because of a hidden defect of which the vendor has knowledge. The principle applying to each case is clearly the same, and therefore the tenant should be allowed a recovery on either theory, since the liability of the landlord may be established on the basis of both fraud and negligence.⁵

The defect must be one which the tenant could not discover on reasonable inspection. If it is open to such inspection so that the tenant as an average man should have discovered it, he cannot recover on either theory, in fraud because he should not have been misled, and in negligence because he has been guilty of contributory negligence.⁶ The tenant cannot recover for personal injuries arising therefrom after the discovery of the defect, since he should then repair it at the landlord's expense, personal injuries thereafter arising not resulting proximately from the landlord's negligence or fraudulent concealment, but from the tenant's failure to remove the danger.⁷

§ 167. Express Covenants; Covenant to Pay Rent.—

Rent is a return issuing out of the land and payable by the tenant to his landlord as an incident of the estate held by the tenant of the landlord. No covenant or agreement to pay rent is necessary; any words which reserve a payment of rent such as "yielding and paying" or "provided the tenant shall pay" or the like, creates a rent charge against the estate of the tenant, his successors and assigns, whether he holds for years, for life or in fee. The proper remedy for recovery of rent is an action of debt. If the tenant has bound himself by covenant or promise, express or implied in fact, either debt or an action in covenant or in

5. See cases in preceding notes.

7. See cases above cited, also § 173,

6. See cases in notes 9, 10 and 11 *post.*
supra, particularly *Boggard v. Gale*,
205 Ill. 511.

assumpsit on the promise will lie, though in the absence thereof debt alone can be maintained. In the absence of a promise or covenant, express or implied in fact, the tenant is liable only by virtue of his "privity of estate" with the landlord, that is by virtue of his holding the estate as tenant from the landlord, for rent accruing while the relationship of landlord and tenant continues.¹ Upon his assigning the term he is not liable for rent thereafter accruing, since he is no longer tenant.² Under an express covenant, binding him personally by his personal promise, or "privity of contract" he remains liable for rent subsequently accruing for the entire term.³ Of course a covenant or promise to pay rent will in every case amount to a reservation of rent chargeable on the estate of the tenant for which debt will lie as well as covenant or assumpsit.⁴

In the absence of words of express promise a covenant or promise to pay rent will be implied as a matter of fact if the words reserving rent together with the other terms of the lease reasonably import an actual promise to pay rent.⁵ Such promise is implied as a matter of fact from the words used as expressing the actual intent of the parties, not as a matter of law.⁶

An action in assumpsit for use and occupation could not be maintained at common law in the absence of an express promise to pay rent or a reasonable compensation.⁷ The English Statute (Geo. II, ch. 19, § 14), which provides for a recovery of the reasonable value of the use and occupation under demises not by deed, has been followed in New York

1. Co. Litt., 47a, 141b, 2 Bl. Com. 41; Walker's Case, 3 Coke, 22a; Auriol v. Mills, 4 Term. R. 94; Wall v. Hinds, 70 Mass. 256. See Holmes Common Law, 252, 264; Ames Hist. of Assumpsit, 2 Harvard L. Rev. 55.

2. See §§ 176, 177, *post*, under Assignment and Subletting.

3. See preceding note.

4. Drake v. Mundy, Cro. Car. 207; Anonymous, 12 Mod. 73.

5. Webb v. Russell, 3 Term. R. 402; Hallett v. Wylie, 3 John's (N. Y.) 44; Bussman v. Ganster, 72 Pa. St. 285.

6. See Tiffany Landl. & Ten. 1032.

7. Ames "Assumpsit for Use and Occupation," 2 Harv. L. Rev. 377.

and many of the states by similar statutes.⁸ No such action will lie where by express agreement the tenant is to hold rent free, or where such agreement can reasonably be implied.⁹ By the terms of the statute the action lies though a rental be expressly reserved, evidence of the rent being received in determining the reasonable value of the use and occupation, recovery being limited to the rent so reserved. The relation of landlord and tenant must exist in order that this action may be maintained. The proper action against a trespasser in possession is ejectment followed by an action for the mesne profits during the period of wrongful occupation.¹⁰ The right to waive the tort and sue in assumpsit in case of unjust enrichment does not exist in cases of wrongful possession or disseisin by a trespasser.¹¹ A tenant holding over at the end of his term, thereby becoming a tenant at sufferance, may be held liable in an action for use and occupation.¹² Though this rule is accepted by the courts generally, it would seem to be clearly inconsistent with the rule generally prevailing that such a tenant is a wrongdoer, and may be held as such for the mesne profits during the entire period of his wrongful holding over, the landlord having elected to treat him as a trespasser, having brought

8. N. Y. Real Prop. L. § 220; 2 Gen. Statutes N. J., § 1915; Hurd's Rev. Statutes, Ill., 1905, c. 80, § 1. See similar statutes in Arkansas, Delaware, Florida, Virginia, West Virginia, Wisconsin and Missouri.

9. Collyer v. Collyer, 113 N. Y. 442; Lamb v. Lamb, 146 N. Y. 317; Becker v. Davis, 87 N. Y. Supp. 422; Middleton's Exrs. v. Middleton, 35 N. J. Eq. 141; Oakes v. Oakes, 16 Ill. 106.

10. Preston v. Hawley, 101 N. Y. 586; Biglow v. Biglow, 75 App. Div. (N. Y.) 98; Hurd v. Miller, 2 Hilt. (N. Y.) 540; Allen v. Thayer, 17 Mass. 299; Kittredge v. Peaslee, 35

Mass. 235, and cases in preceding note.

11. 2 Harv. L. Rev. 380; Keener Quasi Contracts, 191.

12. Osgood v. Dewey, 13 Johns (N. Y.) 240 (a tenancy by the year arose, tenant holding over for three years. Landlord had right to sue for rent or for use and occupation); Schwoebel v. Engelke, 61 N. J. L. 124; Stuart v. Hamilton, 66 Ill. 253; Williams v. Leden, 171 Pa. St. 369; Bacon v. Brown, 9 Conn. 334 (in which case tenancy for another year by holding over arose); Tiffany Landl. & Ten., pp. 1492, 1870, 1871.

the tenancy at sufferance to an end by entry or otherwise.¹³ Entry and actual possession by the tenant is necessary in order that this action may be maintained.¹⁴ He will be liable in this action after such entry, however, for the full term fixed by the lease, though he quit the premises before the term expires.¹⁵

The burden of proving that the relation of landlord and tenant exists is on the landlord in an action for use and occupation.¹⁶ The relation having been found to exist, the law presumes a promise on the part of the tenant to pay the reasonable value of the use and occupation,¹⁷ which, as we have seen, may be rebutted.¹⁸

13. *Tiffany Landl. & Ten.*, 1872; In *Coleman v. Fitzgerald Bros. Brewing Co.*, 29 Misc. (N. Y.) 349, and *Macklin v. McNetton*, 30 Misc. 749, the court held that a tenant holding over cannot be held for rent or use and occupation during the period of his holding over, since the landlord has an election to treat him as a tenant for another month or another year as the case may be, or as a trespasser, excluding any other alternative. It may be possible to sustain the action for such use and occupation on the ground that the landlord may at his election treat the holdover tenant as actually a tenant during the period of his occupation only, a third alternative, instead of as a trespasser. But as against this theory it has been held that where the landlord has brought ejectment against the tenant he cannot hold him for use and occupation, but only for mesne profits as a trespasser, since he cannot be treated as a wrongdoer and in rightful possession at the same time. *Birch v. Wright*, 1 Term. Rep. 378. That a tenant at sufferance may be held for mesne profits as a trespasser, see

§ 157, *ante*. *Osgood v. Dewey*, 13 Johns. (N. Y.) 240, is not inconsistent with the N. Y. cases above referred to. The tenant held over for three years and the landlord having elected to hold him as tenant could sue either for the rent or for use and occupation.

14. *Wood v. Wilcox*, 1 Denio (N. Y.) 37; *Kendall v. Carland*, 59 Mass. 74; *Lewis v. Havens*, 40 Conn. 363; *Franklin Tel. Co. v. Pewtress*, 43 Conn. 167.

15. *Hall v. Western, etc. Co.*, 34 N. Y. 284; *Walker v. Furbush*, 65 Mass. 366 (tenant at will quit without giving notice required in Mass. by statute). *Lockwood v. Lockwood*, 22 Conn. 425.

16. *Preston v. Hawley*, 101 N. Y. 586.

The rule stated in some cases that the relation of landlord and tenant will be presumed to exist from mere occupation by one person of land belonging to another is clearly against the general rule that possession is *prima facie* evidence of ownership. *Tiffany Landl. & Ten.* 1886, note 207.

17. *Preston v. Hawley*, 139 N. Y.

§ 168. **Other Express Covenants.**—The parties may, as heretofore stated, bind themselves and limit and define the estate of the tenant by any other covenants or agreements they please, and if they relate to the term, and tend to define, restrict, or add to the rights of the tenant as holder of the term they run with the land and constitute terms of the relation of landlord and tenant, binding on their heirs, successors or assigns as the case may be, subject to the rules and principles hereafter discussed under “Assignment and Subletting.”¹

Covenants restricting the use of the leased premises, as that the premises shall be used only for a stated purpose, or shall not be used for a stated purpose or purposes, are common.²

Covenants not to use the premises for the purposes of trade or business, but only for the purposes of a residence, covenants not to carry on particular kinds of business, covenants not to commit or allow acts to the annoyance of the lessor or their neighbors, covenants against nuisances, covenants against the use of the premises as a boarding house, and the like, are illustrations.³ For breach of restrictive negative covenants or promises of this kind an action for damages at law will lie, but as such remedy is usually inadequate the usual course is to sue in equity for an injunction forbidding further breaches, in this way enforcing their specific performance.⁴

Covenants by the tenant not to commit waste, not to assign or sublet without the consent of the landlord, not

296, 300; *Carpenter v. U. S.*, 84 U. S. 489; *Watson v. Brainard*, 33 Vt. 88; *Tiffany, Landl. & Ten.* 1887. See cases in note 9, *supra*.

18. See note 9, *supra*.

1. § 174 *et seq.*, *post*.

2. *Hall v. Gould*, 13 N. Y. 127; *Waldorf Astoria Segar Co. v. Salomon*, 109 App. Div. 651, *Aff'd* 184 N. Y. 584.

3. *Weil v. Abrahams*, 53 App. Div. (N. Y.) 313; *Orvis v. Bank*, 81 App. Div. 631; *Ledlinsky v. Budweiser Brew. Co.*, 17 App. Div. 470; *Chautauqua Assembly v. Alling*, 46 Hun (N. Y.) 582, and cases in preceding note.

4. *Waldorf Astoria Segar Co. v. Salomon*, 109 App. Div. 651; *Orvis v. The Bank*, 81 App. Div. 631.

to display signs without such consent, covenants to pay taxes; and on the part of the landlord covenants to rebuild within a reasonable time after notice in case of destruction of the whole or part of the leasehold premises by fire or other unusual action of the elements, are other of the more usual express covenants not heretofore discussed.⁵ Each covenant or agreement is subject to the general principles of contract, and each must be interpreted and enforced in accordance with the intention of the parties, and the rules of interpretation applying to contracts generally.

F.—Incidents of the Relation of Landlord and Tenant Apart from Covenants, Express or Implied.

§ 169. Duty of Landlord to Pay Taxes, Assessments for Permanent Improvements and to Make Changes and Alterations Required by Law.—Since the landlord is entitled to rent, when reserved, or to the reasonable value of the use and occupation, taxes must be paid by him. The rent represents the profits or income from the land, the tenant's profits being the result of his labor and industry, which distinguishes this situation from that of a tenant for life, who receives the profits from the land, and therefore must pay taxes.⁶ Improvements made by the tenant which he has the right to remove or to be paid for at the end of the term are taxable against the tenant, not the landlord,⁷ but if such buildings or other improvements are to become the landlord's property, the tenant having no right to remove them or claim compensation for them, they are taxable against the landlord.⁸ The tenant may pay the taxes to protect his

5. *Skidmore v. Hart*, 13 Hun (N. Y.) 441; *Wilkinson v. Libbey*, 83 Mass. 375. See "Assignment and Subletting," and "Destruction of Leased Premises by Fire," etc., *post*.

6. *Sanford's Appeal*, 75 Conn. 590;

Hart v. Hart, 117 Wis. 639; *State v. Blundell*, 24 N. J. L. 402, and cases in following notes.

7. *People v. B'klyn Board of Assessors*, 93 N. Y. 308.

8. *People v. Barker*, 153 N. Y. 98.

own interest in the land, in case the landlord fails to pay them, and recover the amount from the landlord.⁹ In many states the assessment may be against the owner (landlord) or the occupier (tenant), but if the tenant is so assessed he may, under the statute, deduct it from the next payment of rent, in the absence of an express covenant on his part to pay the taxes as part of his rent.¹⁰ For the same reasons, applying with even greater force, the landlord must pay all assessments for permanent improvements and must make all changes, alterations and improvements required by boards of health, building and other municipal departments or by ordinance or state law.¹¹ An express covenant on the part of the tenant to pay any of these charges, will, of course, bind him, so that as between himself and the landlord the burden will fall on the tenant.¹²

§ 170. Tenant Cannot Dispute Landlord's Title and Must Give Landlord Notice of Adverse Action.—In an action for rent the tenant cannot assert as a defense that the landlord's title is defective unless he has been ousted through the enforcement of the superior title.¹ The rule that the tenant cannot dispute the landlord's title amounts to this only, that

9. *Williams v. Towl*, 65 Mich. 204: § 78 N. Y. Tax Law.

10. Mass. Rev. Laws, 1902, c. 12, §§ 15, 20; Gen. St. N. J., 554, § 449; New York Tax Law, § 78; Tiffany, Landl. & Ten. 840.

11. *De Clerq v. Barber Asphalt Co.*, 167 Ill. 215; *Street v. Central Brewing Co.*, 101 App. Div. 3; *Lindwell v. May*, 111 App. Div. 457; *City of New York v. U. S. Trust Co.*, 116 App. Div. 349; *McVicar Gaillard R. Co. v. Garth*, 111 App. Div. 924.

12. *Oswald v. Gilfert*, 11 Johns. (N. Y.) 443; *Markham v. David Stevenson Brewing Co.*, 104 App. Div. 420; *Cod-*

man v. Johnson, 104 Mass. 491, and cases in preceding note.

Under a covenant to pay taxes a tenant is not required to pay taxes assessed before the term or those assessed or accruing after the term. *Skidmore v. Hart*, 13 Hun (N. Y.) 441; *Wilkinson v. Libbey*, 83 Mass. 375; *Ogden v. Getty*, 100 App. Div. (N. Y.) 430.

1. *Vernam v. Smith*, 15 N. Y. 327, and cases therein cited; *Moore v. Gair*, 108 App. Div. (N. Y.) 23; *Prevot v. Lawrence*, 51 N. Y. 219; *Tilyou v. Reynolds*, 108 N. Y. 558, 563; *Mackin v. Haven*, 187 Ill. 480; *Longfellow v. Longfellow*, 54 Me. 240.

for the period during which the tenant has occupied the premises under the lease he must pay the agreed rent. As we shall see later, as soon as the tenant is evicted by a paramount title, either by being actually ousted or by taking a lease from the true owner, rent is extinguished, so that he is not liable for rent from that time.² If he has been evicted he may sue the landlord, or counterclaim in an action for rent, for breach of the covenant of quiet enjoyment, and his damages will include the amount which he has paid or for which he is liable to the owner of the superior title on account of mesne profits during his wrongful occupation under the lease.³

In an action for use and occupation the tenant is not permitted to set up the invalidity of his landlord's title as a defense, since he received that for which he has expressly or impliedly promised to pay the reasonable value.⁴

It is generally stated that the tenant is estopped from denying the landlord's title. No element of estoppel *in pais* exists, however, in a case of this kind. The tenant has enjoyed the premises under a lease from the lessee, and there having been no ouster he must pay the rent agreed upon in accordance with his contract, the law refusing to take the position that a defect in the landlord's title shall be a defense for rent during the time the tenant has actually enjoyed the premises. An appeal to the doctrine of equitable estoppel would seem to be entirely unnecessary.⁵

In actions of ejectment brought by landlord's against tenants at the end of the term or during the term to enforce a forfeiture arising out of a breach of condition, the tenant is estopped from denying his landlord's title. Since he was let into possession on his express agreement to hold the premises of the landlord as his tenant, he is clearly estopped from asserting a right superior to that of his

2. See § 183, *post*.

3. § 161, *ante*.

4. Cobb v. Arnold, 49 Mass. 398:

Vernam v. Smith, 15 N. Y. 327; Dolby v. Iles, 11 Adol. & Ellis, 235.

5. See note 1, *supra*.

landlord arising solely out of such possession. To permit the tenant to defend his possession as against his landlord by asserting the invalidity of his landlord's title would be manifestly in bad faith and contrary to sound policy.⁶

Notice of the starting of an action against the tenant to recover the property by one claiming a superior title must be promptly given by the tenant to the landlord or he subjects himself to the penalty of paying additional rent as provided by statute.⁷

§ 171. Responsibility for Dangerous Condition of Premises to Third Persons.—As the tenant is the owner of the premises during his term, he and not the landlord is liable to third persons rightfully on the premises who may be injured because of a dangerous condition existing there. We have seen that the landlord is not liable to the tenant for damages arising out of a dangerous condition existing at the time the lease was made except in the case of a hidden defect or danger known to the landlord and which he failed to disclose to the tenant, in which case he may be held liable in an action based on his fraud or on his negligence.¹ It is clear that the landlord owes no greater duty, with reference to the condition of the premises, to the world generally than he owes to his tenant, and therefore, apart from the exceptional cases hereafter considered, the landlord is not liable for damages resulting from a dangerous condition existing at the time of the demise, which he neither negligently nor fraudulently concealed from the tenant.² That

⁶ *Peyton v. Stith*, 30 U. S. 485; *York* statute is the forfeiture of three years' rent to the landlord.

Vallette v. Bilinski, 68 Ill. App. 361; *Thomas v. Young*, 79 Conn. 493; *Barton v. Leonard*, 26 Vt. 192. See *Smith's Leading Cas.* (9th Am. ed.) note, p. 902.

⁷ N. Y. Real Prop. L., § 225; 2 Geo. II, ch. 19, § 12.

The penalty imposed by the New

1. § 166, *ante*.

2. *Jaffe v. Harteau*, 56 N. Y. 398; *Folsom v. Parker*, 31 Misc. (N. Y.) 348; *Jones v. Brumme*, 120 App. Div. 494; *Clyne v. Holmes*, 61 N. J. L. 358; *O'Malley v. Twenty-five Associates*, 178 Mass. 555, and cases in other

the tenant alone is liable for damages resulting from a dangerous condition arising after the letting is settled beyond question.³ The premises are the property of the tenant for the time being, the landlord having no present right of ownership or enjoyment until the expiration of the term.

The willful or negligent concealment of a hidden dangerous condition by the landlord from the tenant when the lease is made, makes him, as we have seen, liable to the tenant in an action of fraud or negligence.⁴ In such case the landlord is liable to any member of the tenant's family or household, or to any stranger rightfully on the premises at the invitation of the tenant.⁵ The damage proximately results from the negligence of the landlord, since accidents to such persons should reasonably be expected by the average person in the landlord's position. If the defect be an open one of which the tenant has had or should have had notice, or if the defect has been disclosed to the tenant, we have seen that the tenant cannot maintain an action for damages resulting therefrom, as there has been no negligence or fraud on the landlord's part.⁶ It follows that in such case no third person could maintain an action in such case against the landlord for the same reason, viz.: there has been no wrong on the landlord's part, since there is nothing to prevent him from letting the premises to a tenant while they are in a dilapidated condition any more than there is a bar to his selling the premises outright while in that condition, there being no fraudulent concealment in either case.⁷

notes under this and following section.

3. *Clancy v. Byrne*, 56 N. Y. 129; *Jennings v. Van Schaick*, 108 N. Y. 550; *Curran v. Flammer*, 49 App. Div. (N. Y.) 293; *Leaux v. New York*, 87 App. Div. 398; *Dalton v. Gibson*, 192 Mass. 1.

4. § 166 *ante*; *Martin v. Richards*,

155 Mass. 381; *Shute v. Bills*, 191 Mass. 433.

5. § 166 *ante*, and cases in preceding notes.

6. § 166 *ante*; *O'Brien v. Capewell*, 59 Barb. (N. Y.) 497; *Akerly v. White*, 58 Hun (N. Y.) 362; *Jordan v. Sullivan*, 181 Mass. 348.

7. Cases in preceding note.

If the tenant discovers the dangerous condition before any harm results, and has ample time to correct it by repairs before the accident to himself, it is clear that he cannot recover. Damages arising from his own personal injuries would not proximately result from the landlord's fraudulent or negligent concealment but from his own failure to repair. The principle here involved seems to be clearly established in the analogous cases on measure of damage for breach of the covenant to repair, whether the covenant be made and broken by landlord or tenant.⁸ There is no question but that the tenant is liable in such case to a third person rightfully on the premises who is injured because of the defective condition after the tenant has discovered it and has failed to remedy it, since ownership and control is in the tenant and he is responsible as owner.⁹ Is the landlord also responsible in such case? The answer turns on the nature of the duty owed by the landlord, at the time the lease is made, to such third persons. It is negligence on his part to lease the premises knowing of a secret defect without disclosing it to the tenant, the specific negligence being the failure to disclose. Damage to third persons resulting from the dangerous condition proximately results from this negligent failure to disclose, since as a reasonable man he should expect such damage to follow. But he is not liable if he discloses the condition to the tenant or if the tenant discovered it before the lease was made. The irresistible conclusion would seem to follow that he is not liable where the accidental injury to a third person happens after the tenant discovers the defect and has failed to remedy it, the negligence of the tenant being in such case the proximate cause of the accident, the failure to disclose the defect on the part of the landlord having no longer anything to do with the situation.¹⁰

8. § 165, *ante*.

9. Cases in preceding notes.

10. See cases cited under this and the following section. Though none

of these cases decides the exact point here involved, this conclusion follows irresistibly from the principles established by these cases.

§ 172. **Premises Leased with Nuisance Thereon.**— If the landlord creates a nuisance or permits one to exist on the premises, and leases them in that condition, he is liable to a third person who is injured as a result of the nuisance.¹ The tenant is also liable provided notice to the tenant of the existence of the nuisance and the elapsing of a reasonable time after such notice in which the tenant should have removed it are established.² The tenant alone, and not the landlord, is liable for nuisances arising during the term.³

A nuisance is any unreasonable use by the wrongdoer of his property which unreasonably interferes with the right of another to enjoy his own property in a reasonable way, or an interference with an incorporeal property right, such as an easement, private or public. It is clear that a mere dangerous condition of private property dangerous only to those who come upon the premises is not a nuisance, though it is sometimes erroneously referred to as such. The duty which the owner of property owes to third persons rightfully on the premises who are not mere licensees is merely a duty to use reasonable care toward them, and the liability arising because of a dangerous condition existing on the

1. *Timlin v. Standard Oil Co.*, 126 N. Y. 514; *Irvine v. Wood*, 51 N. Y. 224; *Jorgensen v. Squiers*, 144 N. Y. 260; *Swords v. Edgar*, 59 N. Y. 28; *Daley v. Savage*, 145 Mass. 38; *Hoffenberth v. Myers*, 42 App. Div. (N. Y.) 183, and cases in notes following.

If the nuisance arises out of the way the premises are used by the tenant, they being capable of use reasonably so as not to constitute a nuisance, the tenant alone, and not the landlord, is liable. *Lufkin v. Zane*, 157 Mass. 117 (tanks for disposal of urine of horses in livery stable, which could have been used by the tenant so as not to constitute a nuisance); *Clifford v. Am. Cotton Mills*, 146 Mass.

471 (accumulation of snow on roof in dangerous quantities could have been prevented by tenant. Steep roof without a guard to prevent snow from sliding on passersby in street not nuisance for which landlord is liable); *Ryan v. Wilson*, 87 N. Y. 47 (no liability on landlord for leasing premises with a machine unguarded. Tenant should have put in guard).

2. *Irvine v. Wood*, 51 N. Y. 224, and other cases in preceding note.

3. *Lufkin v. Zane*, 157 Mass. 117; *Wolf v. Kilpatrick*, 101 N. Y. 146. See, also, the other cases cited under this section, most of them stating the rule of the text either by way of decision or *dictum*.

premises is based solely upon the negligence of such owner, he not having used reasonable care in maintaining the premises in a safe condition, and having invited others to come upon his premises while in a dangerous condition. The rights and responsibilities of the different parties under such circumstances are discussed in the preceding section. The more common cases of nuisance resulting in injuries to third persons for which the landlord has been held liable are coalhole, sidewalk-grating, area, and cellar door cases, in which the thing complained of is in the public street or immediately connected therewith, so that its dangerous condition renders the sidewalk dangerous to the public. The interference with the right to use the sidewalk, being an interference with an easement, is clearly a nuisance, and the rules above stated apply.⁴ The existence of a dangerous wall or structure which is apt to topple into the street or upon a neighbor's property has been generally treated as a nuisance for which the landlord is liable in

4. *Wolf v. Kilpatrick*, 101 N. Y. 146; *Irvine v. Wood*, 51 N. Y. 224; *Jorgensen v. Squiers*, 144 N. Y. 280; *Durant v. Palmer*, 29 N. J. L. 544; *Daley v. Savage*, 145 Mass. 38; *Frischberg v. Hunter*, 173 Mass. 22.

In *Canandaigua v. Foster*, 156 N. Y. 354, the landlord leased the lower floor to a tenant, and retained or leased to other tenants the rest of the building. The court held that the landlord was liable for the condition of a grating which was under control of the tenant and which got in bad condition during the tenancy, the court stating that public policy required that the landlord be held liable where he retained any control of the building though not of the grating. In *Curran v. Flammer*, 49 App. Div. 293, on exactly similar facts the court held that the landlord was not liable.

A mere licensee is one who enters without express or implied invitation, but whose entry, because of general usage, is not a trespass, as entry by a neighbor or social caller or by one seeking to sell goods or to do business with the owner at his own initiative and not at the invitation of the owner. The keeping open of a store, office or other place of business is an invitation to the public to enter, and a person so entering is a licensee by invitation and not a mere licensee. A mere licensee cannot recover against either landlord or tenant for injuries arising out of a nuisance or other dangerous condition, except where it constitutes something in the nature of a trap against which he could not reasonably guard himself. *Sterger v. Van Sicklen*, 132 N. Y. 499, and cases cited.

case it falls and does damage, if the premises were leased in that condition.⁵ Defective plumbing on the leased premises, such as a loft or apartment, resulting in leaks doing damage to other tenants on lower floors is another illustration.⁶ In any such case the letting of the premises in that condition makes the landlord liable, he having created the nuisance, or having permitted it to exist, and having leased the premises in that condition. The landlord is liable though the tenant knew of the existence of the nuisance and failed to repair it. The landlord becomes a party to it since he impliedly authorizes the continued use of the premises in the condition existing at the time the lease is made, the tenant being under no obligation to the landlord to repair the defect. Since the tenant is owner and therefore responsible for the condition of premises during the term, he is liable to third parties provided he knew or ought to have known of the nuisance, and permitted it to continue. Of course the landlord is not liable for nuisances arising during the term, as he is in no way responsible for them.⁷ If, however, he renews the lease for a further term after the nuisance has come into existence, he becomes a party to it and will be liable to a third person subsequently injured because of it.⁸

Why should the landlord be liable to third persons for a nuisance existing when the lease is made and of which the tenant has knowledge, when no liability arises out of a defective condition not amounting to a nuisance of which the tenant has knowledge? This rule can be justified only on the theory that the landlord becomes a party to it by im-

5. *Timlin v. Standard Oil Co.*, 126 N. Y. 514; *Hoffenberth v. Myers*, 42 App. Div. 283.

6. *Igwarsen v. Rankin*, 47 N. J. L. 18. Other instances of nuisance for which the landlord may be held liable are: Dangerous condition of a passage from the street, *Davenport v.*

Ruckman, 37 N. Y. 568; mill wheel so placed as to frighten horses in street. *House v. Metcalf*, 27 Conn. 631.

7. See cases in note 3, *supra*.

8. *Timlin v. Standard Oil Co.*, 126 N. Y. 514; *Igwarsen v. Rankin*, 47 N. J. L. 18.

pliedly authorizing the tenant to continue the premises in the same condition, receiving a rent, viz.: a profit from the land, for the use of the land in that condition. The rule cannot be based on the theory of the landlord's negligence, as the letting of the premises in a dangerous condition to the knowledge of the tenant is no more negligence in the one case than in the other. Furthermore the act of letting, if wrong, is wilfully wrong, not negligently wrong.⁹

A line of cases involving the principle on which cases of nuisance turn are leases of public halls or other places for the express purpose of using them for public entertainments or the like. If the landlord leases premises for such a purpose knowing of a dangerous condition existing thereon, whether it amounts technically to a nuisance or not, and whether the tenant knows of it or not, he is liable to any third person rightfully on the premises who may be injured as a result thereof.¹⁰ Many of these cases present no difficulty because the so-called lease is really a license, the owner remaining responsible for the condition of his property throughout. But it is well settled that the rule applies where a tenancy exists, and the reason underlying the rule is the same one on which the nuisance cases turn: having let the premises for public use, and having authorized their use for such purpose, the landlord becomes a party to their use for such purpose, and is therefore liable to any third person rightfully on the premises who is injured because of a condition which makes them dangerous for use by the public.

§ 173. Effect of Covenant to Repair by Landlord.—There is some authority for the proposition that if the landlord has covenanted to make necessary repairs he may be held liable by a third person injured because of a dangerous condition arising during the term. This ruling is based on the premise that the tenant may recover from the land-

⁹. See cases in preceding notes under this section.

lord whatever amount he may be compelled to pay to the person injured in an action for breach of the landlord's covenant to repair, and to avoid circuity of action the person injured is permitted to sue the landlord directly, it being admitted that the landlord owes no duty to repair except under his covenant, and that he is liable for breach of such covenant only to the tenant.¹ The better rule, settled in most jurisdictions by the great weight of authority, is that the landlord cannot be held because the tenant cannot include in his recovery from the landlord for breach of his covenant to repair any sum which he may have been compelled to pay to the person injured in such case, the measure of damages being the cost of making the repairs himself, the theory being that the tenant should make the repairs himself where they are not extensive in character and charge the same to the landlord.² Where the repairs

10. *Swords v. Edgar*, 59 N. Y. 23 (pier); *Clancy v. Byrne*, 56 N. Y. 129 (pier); *Fox v. Buffalo Park*, 21 App. Div. 321, *aff'd* 163 N. Y. 559 (collapsing of grandstand); *Camp v. Wood*, 76 N. Y. 92 (hall let for entertainment); *Barrett v. Lake Ontario Beach Imp. Co.* (defective toboggan slide used regularly by guests of public bathing establishment). See *dictum* by Gaynor, J., in *Folsom v. Parker*, 31 Misc. (N. Y.) 348; *Eckman v. Atlantic Lodge*, 68 N. J. L. 10 (tenant in such case liable only for such defects as he knows of or could discover by reasonable inspection); *Oxford v. Leathe*, 165 Mass. 254.

1. *Inhabitants of Milford v. Holbrook*, 91 Mass. 17; *City of Lowell v. Spaulding*, 58 Mass. 277 (*dicta*); *Gridley v. Bloomington*, 68 Ill. 47 (*dicta*); *Boyce v. Tallerman*, 183 Ill. 115, at 123 (*dicta*). See, also, *dicta* in *Ahearn v. Steele*, 115 N. Y. 203, and the clearly erroneous *dicta* in

May v. Ennis, 78 App. Div. 552 in which case the court refers to the failure of the landlord to repair according to his covenant as negligence.

The authority of the earlier Massachusetts cases is badly shaken by the case of *Miles v. Janvrin*, 196 Mass. 431, the court stating that the landlord's liability to third persons under a covenant to repair arises only where he has expressly undertaken the duty of maintaining the premises in safe condition in any event and where no notice by the tenant of the need of repairs is required. In the usual case where such notice is required the landlord is not liable to third persons.

2. *Frank v. Mandel*, 76 App. Div. (N. Y.) 413; *Sterger v. Van Sicklen*, 132 N. Y. 499; *Stelz v. Van Deusen*, 93 App. Div. 358; *Sherlock v. Rushmore*, 99 App. Div. 598; *Folsom v. Parker*, 31 Misc. (N. Y.) 348; *Clyne v. Helmes*, 61 N. J. L. 358.

are extensive the measure of damages, as we have seen, is the difference in value of the leasehold estate with the premises out of repair and its value with the premises in repair.³ It is clear that damages for injuries to third persons are no more the proximate result of failure to repair by the landlord than they would be in the case of a failure to repair by any carpenter or other general contractor who might enter into a contract with a tenant to make the repairs in any case. As the doctrine of circuity of action cannot be sustained, and it is clear that the landlord owes no duty to anyone with reference to the condition of the property except under his covenant to repair, it follows that there is no principle on which he can be held liable by a third person under the circumstances here discussed.⁴

Where the landlord leases apartments, offices, stores, lofts, or other parts of the premises to different tenants, retaining possession of the halls, elevators, stairways, roofs, area-ways, etc., it is clear that he is liable for the condition of the parts so retained within his control and possession, and must answer in damages to a tenant or third person rightfully on the premises for injuries arising out of a dangerous condition therein of which he has actual or constructive notice.⁵

G.—Assignment and Subletting.

§ 174. Assignment and Subletting Distinguished.—An assignment is a transfer or conveyance by the tenant of his entire interest or estate in the leasehold premises, or part thereof, to the assignee. The tenant's interest in the land covered by the assignment ends, and the assignee becomes the owner of the land under the lease, taking the place of the tenant, and having the same interest or estate in the

3. See § 165, *ante*.

4. See cases in note 2, *supra*.

5. Peil v. Reinhart, 127 N. Y. 381;
Dullard v. Roberts, 130 N. Y. 269;

Idel v. Mitchell, 158 N. Y. 134; Galeb

v. Pisirsky, 178 N. Y. 458; Lynch v.

Swan, 167 Mass. 560.

land that the tenant had before the assignment, as defined and limited by the terms of the lease. A subletting is a letting of the leasehold premises to a subtenant for a part of the original term, the tenant or sublessor retaining a part of the term under the original lease. The subletting creates a new relationship of landlord and tenant between the sublessor and sublessee, the sublessee's interest being a new estate carved out of the estate of the original tenant, or sublessor. The reservation of any reversionary interest whatever makes the transaction a subletting, though in the form of an assignment, while a transaction in the form of a subletting for the entire balance of the term, without the reservation of a reversion of any kind, is an assignment.¹ Where no reversion has been reserved, and the tenant has therefore transferred his entire estate, the transaction cannot be a subletting because the assignee has stepped into the place of the assignor and becomes bound by the covenants and reservations of the lease running with the land. He holds from the original landlord under the terms of the original lease, and not from the assignor. No new relationship of landlord and tenant between the assignor and assignee has arisen. For like reasons where a reversion has been reserved, the transaction cannot be an assignment. A new relationship of landlord and tenant has arisen between the sublessor and the sublessee. There is no transfer of the original relationship, since a reversion has been reserved, and therefore the sublessee cannot hold under the original lease from the original landlord.¹ It has been suggested in one case that a transaction in the form of a sublease for the entire balance of the term, though an assignment of the term rendering the so-called subtenant liable as assignee under the original lease, may at the same time

1. *Bedford v. Terhune*, 30 N. Y. 36 N. Y. 569; *Firth v. Rowe*, 53 N. J. 453; *Woodhull v. Rosenthal*, 61 N. Y. Eq. 520; *Field v. Mills*, 33 N. J. L. 382; *Stewart v. Long Island R. R.* 254, and cases in notes immediately Co., 102 N. Y. 601; *Davis v. Morris*, following.

be given effect as a sublease between the immediate parties, a different rental being reserved in the so-called sublease.² As the two positions are absolutely inconsistent it seems clear that all the court means is that the assignee will be bound by any promises which he may have made in connection with the assignment. If he has promised to pay a higher rent, after paying the rent reserved in the original lease he must pay to the assignor the excess amount agreed upon.³

A right to enter for breach of condition is not a reversion, and a reservation of such a right does not change an assignment into a subletting.⁴ The assignor may make the assignment subject to forfeiture for breach of condition, just as a grantor for life or in fee may do the same thing, but in neither case is the possible right to enter for breach of the condition a reversion. The entire estate passes in each case, subject to the condition.⁵ A right to enter at the end of the term reserved by the original tenant, the surrender of the premises to the original landlord to be made by him, makes the transaction a subletting if such be the intention of the parties. Here a reversion is reserved, since the taking of the premises at the end of the term and the surrendering

2. *Stewart v. Long Island R. R. Co.*, 102 N. Y. 601.

In *Drake v. Lacoe*, 157 Pa. St. 17, a lease for the entire balance of the term at a different rental is treated as a subletting. It is clear that such a letting is an assignment, on principle and by the great weight of authority, and therefore the reservation of a different rental cannot make the transaction a subletting also, since it must be one or the other—it cannot be both at the same time. *Firth v. Rowe*, 53 N. J. Eq. 520; *Field v. Mills*, 33 N. J. L. 254.

3. *Sexton v. Chicago Storage Co.*,

129 Ill. 318, and cases in note preceding.

4. *Woodhull v. Rosenthal*, 61 N. Y. 382; *Herzig v. Blumenkrohn*, 122 App. Div. (N. Y.) 756.

In Massachusetts where the rule is established that a right to enter for breach of condition can be devised, it is held to be an estate, constituting a reversion, and therefore renders a letting upon condition for the entire balance of the term a subletting. *Dunlap v. Bullard*, 131 Mass. 161. This illustrates how one error leads to others.

5. See chapter on Estates upon Condition, *post*.

of them by the original tenant to his landlord necessarily involves some few moments of time during which the tenant is entitled to the possession just before the expiration of the original term. A new tenure, and therefore a new relationship of landlord and tenant between tenant and subtenant, is created in such case.⁶

Possession during the term by a third party gives rise to a presumption that the tenant assigned the term to him, and the burden is cast on such third person to introduce evidence explaining his possession in order to overthrow this presumption.⁷ Payment of rent under the lease to the landlord is *prima facie* evidence of a valid assignment. An assignment of part of the leasehold premises for the balance of the term is an assignment *pro tanto*, not a subletting, the assignee being chargeable with so much of the rent as may have been reserved in the lease for the part of the premises assigned, or the rent will be apportioned.⁸

§ 175. Formal Requisites of Assignments and Subleases.

—By the English Statute of Frauds no assignments are valid unless in writing, signed by the assignor or his agent duly authorized in writing, or by act and operation of law.¹ Substantially the same provisions have been enacted in Massachusetts, New Jersey, and some other states.² In

6. *Ganson v. Tift*, 71 N. Y. 48; *Post v. Kearney*, 2 N. Y. 394; *Martin v. O'Connor*, 43 Barb. (N. Y.) 522; *Koppel v. Tilyou*, 70 N. Y. Supp. 910; *Sexton v. Chicago Storage Co.*, 129 Ill. 318. Where the surrender is to be made to the original lessor by the subtenant, the sublease in form is legally an assignment. *Herzig v. Blumenkronn*, 122 App. Div. 756.

7. *Bedford v. Terhune*, 30 N. Y. 453; *Foster v. Oldham*, 8 Misc. 331; *Frank v. N. Y. & L. E. & W. R. Co.*, 122 N. Y. 197.

If the lease contains a covenant or condition not to assign no assignment will be presumed. *Dey v. Greenebaum*, 82 Hun (N. Y.) 533.

8. *Woodhull v. Rosenthal*, 61 N. Y. 382; *Stover v. Chasse*, 6 Misc. (N. Y.) 394; *Hollywood v. First Parish, Brockton*, 192 Mass. 269.

1. 29 Car. 2, c. 3, § 3.

2. Mass. Rev. Laws, c. 127, § 3; N. J. Gen. Stat., p. 1602, § 2. See *Tiffany, Landl. & Ten.*, p. 953, note.

New York assignments of leasehold estates of over a year must be in writing, signed by the assignor or his agent duly authorized in writing.³ Many other states have enacted statutes with substantially the same provisions.⁴ Though the lease be under seal the assignment need not, since the lease as an instrument is not assigned, but rather the estate for years created by the instrument.⁵ Subleases are governed by statutes applying to leases generally.

§ 176. Effects of Assignment; Liabilities of Assignee.—

Since the assignment transfers the relation existing between the landlord and tenant to the assignee, it follows that the assignee becomes liable on all covenants, promises, reservations and conditions contained in the lease which tend in any way to define, limit or qualify the estate created by the lease. These express the terms of the tenure under which the land is held of the landlord. The covenants or contracts therein contained relating to the tenancy are said to "run with the land," and are said to bind the assignee for that reason. In so far as the relation of landlord and tenant is concerned this means only that these covenants express the terms under which the tenant holds, and they become binding upon any of his successors in interest, as incidents of the term to which they have succeeded. The covenant or promise to pay rent, or reservation of rent, the express covenant not to commit waste, to repair, to pay taxes, to renew the lease, not to assign without the landlord's consent, not to use the property for stated forbidden purposes, and the like are the more usual covenants which run with the land and bind the assignee or may be enforced by him, as the case may be.⁶ Covenants or promises purely

3. N. Y. R. Prop. L. § 242.

5. *Sanders v. Partridge*, 108 Mass.

4. See Statutes of Kansas, Mich., Minn., Mont., Nev., Neb., Utah and Wisconsin cited in *Tiffany Landl. & Ten.*, p. 953, note.

556.

6. *Spencer's Case*, 5 Coke, 16a; *Crawford v. Witherbee*, 77 Wis. 419; *Bedford v. Terhune*, 30 N. Y. 453;

personal in their nature, in no way relating to the tenancy or defining the terms under which the land shall be held, do not bind the assignee.⁷ The assignee is liable only by virtue of his privity of estate with the landlord, the holding or tenure of the leasehold estate from him, not because of any personal promise or covenant. There is no personal obligation arising out of any promise or contract made by the assignee since he makes none. Therefore if he assigns to another he is not liable for any breach of these covenants that may be committed by the second or subsequent assignees, but only for such breaches as may have been committed by himself. On assigning in turn to another the privity of estate on which his liability depends passes on to that other, and he becomes a stranger to the term.⁸ Entry on the part of any assignee is not necessary to render him liable for

Astor v. Hoyt, 5 Wend. (N. Y.) 603; *Dananbeig v. Rheinheimer*, 24 Misc. (N. Y.) 712. That the assignee is not liable for breaches committed before the assignment, there is, of course, no question. A breach committed before the assignment gives rise to a cause of action for damages against the tenant personal to him which does not run with the land so as to bind the assignee by privity of estate. *Astor v. Hoyt*, 5 Wend. 603, and cases above cited. The assignee is not liable, therefore, for rent due in advance before assignment, though covering a period elapsing after the assignment was made. *Wolf v. Gluck*, 24 Misc. (N. Y.) 763. See also *Townsend v. Scholey*, 42 N. Y. 18; *Washington Natural Gas Co. v. Johnson*, 123 Pa. St. 576. In New York one in possession holding under a contract by the tenant to assign is liable as assignee, he being regarded as the owner of the term in everything except the bare legal title. *Mead v.*

Madden, 85 App. Div. 10. Possession under the tenant unexplained is *prima facie* evidence of an assignment which renders the person in possession liable. See § 174, note 7, *supra*; also *Hatch v. Van Dervoort*, 54 N. J. Eq. 511; *Noble v. Thayer*, 19 App. Div. (N. Y.) 446.

7. See cases in preceding note.

8. *Durand v. Curtis*, 57 N. Y. 7; *Clark v. Aldrich*, 4 App. Div. N. Y. 523; *Dassori v. Zarek*, 73 N. Y. Supp. 841; *Simmons v. Turner*, 120 Mass. 328; *Bell v. Am. Protection League*, 163 Mass. 558.

The assignor, of course, remains liable for breaches committed by him before assignment made by him. *Cons. Coal Co. v. Peers*, 150 Ill. 344; *Quackenboss v. Clark*, 12 Wend. 55. The reassignment is effective to relieve the first assignee from liability for subsequent breaches though in violation of a covenant not to assign. *Donaldson v. Strong*, 195 Mass. 429.

rent or for breach of any of the covenants of the lease. Some authority exists based on the old cases, and the old doctrine of seisin and livery of seisin, to the effect that entry by the assignee is necessary before he becomes liable, but the prevailing view is that such entry is now unnecessary. Since delivery of possession is no longer essential to a conveyance, and since an estate for life or in fee may be transferred by deed without entry so as to vest title and seisin in the grantee, it is clear that delivery of possession is not necessary in the case of the assignment of a term to make the assignment effective and complete as a transfer of the tenant's estate for all purposes. This applies to any reassignment as well as to the first assignment.⁹

If the assignee expressly assumes the performance of the covenants of the lease, promising to perform them, he becomes personally liable to the landlord thereon by virtue of the covenant or promise of assumption. This personal obligation renders him liable after a reassignment to another, for breaches subsequently committed, his liability being that of surety, and therefore giving him the right to hold the second or subsequent assignee actually guilty of the breach, for the amount which he may be compelled to pay.¹⁰ The assumption by the assignee must be in express terms. An assignment of the lease, "with all its

9. *Collins v. Pratt*, 181 Mass. 345, distinguishing *Sanders v. Partridge*, 108 Mass. 556; *Benedict v. Everard*, 73 Conn. 157; *Fennell v. Guffey*, 155 Pa. St. 38; *Babcock v. Scoville*, 56 Ill. 461.

The rule in New York is in accordance with the general rule, though in one or two cases the court has spoken of a reassignment by the assignee *and the relinquishment of possession* by him as freeing him from liability for rent thereafter accruing. A careful examination of the cases shows that

the failure to relinquish possession by the assignee upon making a reassignment is material only in determining whether a real assignment was made, or only a colorable or pretended one, which latter would not free the assignee from such liability. *Tate v. McCormick*, 23 Hun (N. Y.) 218; *Durand v. Curtis*, 57 N. Y. 7; *Clark v. Aldrich*, 4 App. Div. (N. Y.) 523.

10. *Springer v. DeWolf*, 194 Ill. 218; *Dickinson Co. v. Fitterling*, 72 Minn. 463

covenants, terms and conditions " or " subject to the rents, covenants, conditions and provisions " does not amount in either case to a covenant of assumption, since the acceptance of the assignment subject to the terms of the lease involves merely the obligations arising out of the privity of estate created by the transfer, not any personal liability arising out of express contract.¹¹

When the lease provides for a renewal of the lease, or for an extension of the term at the option of the tenant upon his giving a stated notice, the exercise of the option in either case by an assignee makes him personally liable in contract on the covenants of the lease for the renewed or extended term, he becoming the original tenant for the extended term by his exercise of the option.¹²

§ 177. Liability of Original Assignor.—The original assignor remains personally liable on his express covenants or promises contained in the lease, not only for breaches committed before the assignment by the assignor himself, but also for all breaches committed by his assignee or any subsequent assignee. This personal liability arising out of his express contract is, of course, in no way discharged or released by an assignment in the absence of a release by the landlord or the acceptance by the landlord of the express covenant or promise of assumption made by the assignee in discharge of the original assignor's liability by way of novation.¹ Covenants implied by law, or duties imposed by law upon the tenant as incidents of the relation of landlord and tenant, bind him only as long as he continues to hold the land as tenant, and upon assigning the term and quitting the premises he is not liable for breaches of these covenants or duties thereafter committed by the assignee or his successors.² Thus he is not liable, in the absence of

11. Consolidated Coal Co. v. Peers, 166 Ill. 361; Dassori v. Zarek, 71 App. Div. (N. Y.) 538. 12. Probst v. Rochester Steam Laundry Co., 171 N. Y. 584. 1. Wall v. Hinda, 70 Mass. 256;

express covenant, for the assignee's failure to repair, for waste committed by the assignee, or for a wrongful denial of the landlord's title, or failure to give notice of an adverse action started by a stranger on the part of the assignee. These duties do not depend on any express promise, but upon the privity of estate, the relationship of landlord and tenant, as in the case of the liability of an assignee upon the covenants of the lease.

As to the assignee the liability of the original assignor upon express covenants or promises of the lease is that of surety, and if he is compelled to pay the rent or to answer for breach of any other covenant or promise on the part of the assignee, or any of his successors in interest, he may recover the amount so paid in an action against the assignee or his successor actually guilty of the breach.³

§ 178. Sublessor and Sublessee.—As already stated a subtenant is a stranger to the original landlord, incurring no liability on the covenants contained in the lease arising out of either privity of contract or privity of estate. The subtenant holds from the sublessor or original tenant, and is bound to him alone, and only by the covenants and promises of the sublease.⁴ But anything which defeats the sublessor's estate will necessarily destroy the estate of the subtenant, and therefore the landlord may enter against both tenant and subtenant for breach of condition contained in the original lease.⁵ If the sublessor fails to pay the

Jackson v. Brownson, 7 Johns. (N. Y.) 227; Creveling v. De Hart, 54 N. J. L. 338; Hartz v. Eddy, 140 Mich. 479; Consolidated Coal Co. v. Peers, 166 Ill. 361; Rector v. Hartford Deposit Co., 190 Ill. 380; Washington Nat. Gas Co. v. Johnson, 123 Pa. St. 576; Jordan v. Indianapolis Water Co., 159 Ind. 337.

2. Consolidated Coal Co. v. Peers, 166 Ill. 361; Wall v. Hinds, 70 Mass. 256.

3. Farrington v. Kimball, 126 Mass. 313; Collins v. Pratt, 181 Mass. 345; Crowley v. Gormley, 59 App. Div. (N. Y.) 256; McKeon v. Wendelken, 25 Misc. 711.

4. Martin v. O'Connor, 43 Barb. (N. Y.) 514; Field v. Mills, 33 N. J. L. 254; Dunlap v. Bullard, 131 Mass. 161.

5. See Ch. XII, *post*, Conditional Estates.

rent reserved in the original lease and the landlord has the right to terminate the lease on that account, the subtenant may pay the rent to the original landlord and set off the amount against the rent due the sublessor under the sublease, or may recover it in an action against the sublessor for money paid to his use. The subtenant is not a volunteer in such case; the payment is made in order to protect his interest from possible destruction through the ending of the tenant's term, and he need not wait till the landlord takes action before making such payment.⁶

The making of a sublease works no change in the relation existing between the original landlord and tenant, their rights and liabilities remaining as before. This follows obviously from the fact that a sublease gives rise to a new relationship of landlord and tenant between the tenant and subtenant to which the original landlord is a stranger, in no way transferring the term or affecting the relationship of the parties to the original lease.

As between sublessor and sublessee, the relationship of landlord and tenant exists, subject, in general, to all the incidents attaching to that relationship.

§ 179. Restrictions Upon Assigning and Subletting.— Since a term of years is an estate in the land, it follows that like other estates it may be transferred by the tenant at his pleasure in the absence of restrictions in the lease. As we have seen, a transfer of his entire interest in all or a part of the land is an assignment, while a transfer of part of his interest, for a part of the term, is a subletting. Leases usually contain a covenant on the part of the tenant binding him not to assign or sublet without the consent of the landlord, and reserving a right to enter and terminate the tenant's interest for breach of the covenant. The

⁶ *Peck v. Ingersoll*, 7 N. Y. 528;
Raubitscheck v. Semken, 4 Abb. N. C.
 205. note.

restriction sometimes takes the form of a covenant not to assign, or a covenant not to sublet, or a covenant not to assign or sublet, without any provision as to the consent of the landlord. Since provisions of this kind are restraints upon the free alienation of estates in land the courts do not favor them, and they are very strictly construed. Therefore a covenant or condition against assigning does not prevent subletting, and a sublease without the landlord's consent is not a violation of such provision.¹ For the same reason an assignment is not a violation of a covenant or condition not to sublet.² An assignment of a part of the leased premises is not a violation of a general covenant not to assign, the courts construing such a covenant as forbidding assignments of the tenant's interest in the entire premises, not a part thereof.³ Therefore, to protect landlords against such assignments it is necessary to provide that the tenant shall not assign his term in the whole or any part of the leased premises.

These restrictions have no application to licenses in any form, where a third party is permitted to occupy the premises or some part thereof as a licensee for certain stated purposes. Therefore the putting of a caretaker in possession,⁴ the letting of a room to a lodger under a contract for board and lodging,⁵ the so-called "leasing" of a wall for advertising display⁶ and the like, are not violations of these restrictions, since no exclusive possession of the premises is given in such cases to the licensee.

Transfers by will, or by operation of law, are not in violation of these restrictions. A general restriction upon

1. *Stephenson v. Silvernail*, 17 Johns. (N. Y.) 278; *Riggs v. Purcell*, 66 N. Y. at p. 201, and cases there cited; *Den d. Bockover v. Post*, 25 N. J. L. 285; *Moore v. Guardian Trust Co.*, 173 Mo. 218.

2. *Lynde v. Hough*, 27 Barb. (N. Y.) 415; *Field v. Mills*, 33 N. J. L.

254. See cases in preceding note.

See *dicta contra*, *Den d. Bockover v. Post*, 25 N. J. L. 285.

3. *Roosevelt v. Hopkins*, 33 N. Y. 81; *Randol v. Scott*, 110 Cal. 590. See *contra*, *Boston C. & M. R. Co. v. Boston & Lowell R. Co.*, 65 N. H. 373, at 452; *Emery v. Hill*, 67 N. H. 330.

assigning and subletting is construed as applying only to voluntary acts of the tenant or his successors in interest *inter vivos*, and therefore it does not prevent the passing of the tenant's interest to his next of kin on his death, or to his legatee by will.⁷ For the same reason, in the absence of an express provision in restriction thereof, an assignment in bankruptcy or an assignment for the benefit of creditors,⁸ or a sale of the term under execution or under foreclosure of a mortgage of the term,⁹ are not in violation of a general covenant not to assign or sublet. The mortgaging of the term is not a violation, since it results in creating a lien only on the term, subject to which the tenant's interest continues in him as before.¹⁰

§ 180. Remedies for Breach of Covenant Not to Assign or Sublet.—If the lease contains a covenant not to assign or sublet, without reservation of a right of entry or of forfeiture in case of a breach, an assignment or sublease made in violation of the covenant is valid. The landlord cannot enforce a forfeiture, since the covenant was not also made a condition by reserving the right to enter. His remedy is

4. *Presby v. Benjamin*, 169 N. Y. 377.

5. *Peaks v. Cobb*, 197 Mass. 554.

6. *Lowell v. Strahan*, 145 Mass. 1.

7. *Jackson v. Silvernail*, 15 Johns. (N. Y.) 278; *Farnum v. Hefner*, 79 Cal. 575.

8. *Bemis v. Wilder*, 100 Mass. 446; *In re Bush*, 126 Fed. 878. A voluntary assignment for benefit of creditors was held to be a voluntary act, and therefore not by operation of law, and was held to be a violation in *Medinah Temple Co. v. Currey*, 162 Ill. 441.

9. *Riggs v. Purcell*, 66 N. Y. 193; *Dunlop v. Mulry*, 85 App Div. 493.

In *West Shore R. Co. v. Wenner*,

70 N. J. L. 233, a mortgage followed by a sale under foreclosure amounted to a breach of the covenant not to assign; the mortgage alone was not a breach, creating a lien, but it was a voluntary act, and when followed by a sale under foreclosure the assignment was completed as a result of the voluntary act of the tenant. In the New York cases above cited the court holds that the foreclosure sale is a transfer by operation of law as truly as a sale under execution, the one being no more the voluntary act of the tenant than the other.

10. See cases in preceding note, also, *Barry v. Hamburg-Bremen Fire Ins. Co.*, 110 N. Y. 1.

to sue the tenant for damages arising out of the breach of the covenant.¹ Whether he can get an injunction in equity to restrain a threatened breach, or to prevent the assignee from occupying the premises, is a question which will be discussed hereafter. Where a right to enter or to enforce a forfeiture of the term because of a breach of the covenant is reserved in the lease, the landlord may recover damages for breach of the covenant and also oust the tenant for breach of condition.² In any event the assignment or sublease is valid and binding as between the tenant and assignee or the tenant and subtenant. It is valid for all purposes at law, subject to the landlord's right to enforce a forfeiture for breach of condition.³ But by ousting the tenant the landlord puts an end to the term, ending at the same time his right to recover rent thereafter accruing. Is the landlord forced in every case of this kind to the alternative of either waiving the breach and accepting rent from the assignee, with the right to hold the original tenant for any damages arising out of the assignment, or of ousting tenant and assignee or subtenant for breach of condition, thereby losing his right to recover rent from the tenant for the balance of the term, and having only his action for damages for breach of covenant? Why should he not have the right to insist on the specific performance of the negative covenant, just as he would have the right to the specific performance of negative covenants restricting the tenant in the use of the leased premises? Where the assignment or subletting involves a use of the premises contrary to the uses for which they were leased, it is clear that an injunction restraining such occupation and user by the assignee or subtenant will be granted.⁴ But where no

1. See Ch. XII, *post*.

2. See Ch. XII, *post*.

3. Sayres v. Kerr, 4 App. Div. (N. Y.) 150; Broadway, etc. Co. v. Myers, 49 Misc. (N. Y.) 531; Bemis v. Wilder, 100 Mass. 446; Blake v. Sander-

son, 67 Mass. 332; Sexton v. Chicago Storage Co., 129 Ill. 318; Putney Bros. Co. v. Milwaukee Light, etc. Co., 134 Wis. 379.

4. Godfrey v. Black, 39 Kan. 193; McEachern v. Cotton, Appeal Cases,

such forbidden user is involved the question seems to be an open one. On the one hand it may be said that equity should be slow to specifically enforce contracts in restraint of alienation, since the free alienation of interests in land is desirable and in accordance with the public interest. On the other hand, the law recognizes such restraints as valid, and as a practical matter they are necessary to the protection of the interests of landlords. The landlord's remedy at law is inadequate, since he is compelled at law either to enforce a forfeiture and give up his right to hold the tenant for rent thereafter accruing, or to waive the breach, acquiescing in the assignment or subletting, and having only an action for damages for breach of the covenant. It would seem, therefore, that in the usual case he should have the further remedy of an injunction restraining a threatened assignment or subletting, or if the breach has been committed, restraining the assignee or subtenant from occupying the premises as tenant, without in any way affecting his right to hold the original tenant for rent accruing during the balance of the term.⁵

A covenant not to assign or to sublet runs with the land and is binding on the tenant's personal representatives and assigns.⁶ On principal this is true in all cases whether the term "assigns" be used or not in the covenant. In some cases, however, it has been decided that a covenant on the part of a tenant, simply, not to assign, with no provision to the effect that the assignees of the tenant shall not assign, was not intended to bind assignees of the tenant, and therefore where he has assigned with the landlord's consent, or where the landlord subsequently accepts the assignment, waiving the breach, the assignee may assign in turn as he pleases, since the covenant or condition was not intended to apply to him, but only to the original ten-

104; *Koepker v. Redel*, 116 Mo. App. 62, at p. 69 (dicta); *Gillian v. Norton*, 33 Hon. Pr. (N. Y.) 373 (dicta).

5. See cases in preceding note.

6. *Williams v. Earle*, L. R. 3 Q. B.

739.

ant, and was therefore capable of only a single breach, which was consented to or waived by the landlord, thus putting an end to the condition altogether.⁷ This is another example of the rules of strict construction applied to these restrictions. It is clear that these covenants touch and affect the land, and are highly important terms of the tenure under which the tenant holds, and therefore it is clear that they should bind the assignee when such tenure is transferred to him by assignment.

§ 181. Transfer of the Reversion.—The landlord, being owner of the fee subject to the term of years, may convey his interest, transferring to the grantee exactly the same estate in the land which he had theretofore held, and subject to exactly the same incidents. As between the tenant and the landlord's grantee, exactly the same tenure exists as existed before the conveyance of the reversion, the grantee stepping into the landlord's place under the lease, being chargeable with and having the right to enforce all covenants in the lease relating to the land and affecting the tenure under which it is held. The principles applying to the enforcement of such covenants as between an assignee of the tenant and the landlord apply also to cases where the landlord has conveyed his estate. It is probable that this was the common law rule before the enactment of the statute, 32 Henry VIII, c. 34, the better opinion being that the statute in question was in the main declaratory of the common law rule.⁸ That statute, in any event, enacted the above rule of liability both in the case of transfers of the term by assignment on the part of the tenant and in the case of conveyances of the reversion by the landlord. This statute has either been followed by statutes in substantially

7. *Bally v. Wells*, 3 Wils 25; *Kohler v. Brady*, 78 Hun (N. Y.) 443; *Murray v. Harway*, 56 N. Y. 337.

Dumpor's case as applying to this situation, see Ch. XII, *post*.

8. See *Sims*, *Covenants which Run*

For a discussion of the rule in with the Land, pp. 66, 77, 80

the same form in the different states, or it has been adopted as part of the common law of the state in those states where no such statute has been enacted.⁹

H.—Suspension and Extinguishment of Rent; Eviction, Taking by Eminent Domain, Surrender, Forfeiture, Merger and Destruction of Leased Premises.

§ 182. **Eviction.**—An eviction of a tenant is the ousting of him from the whole or some part of the leased premises either by the act of the landlord or by the enforcement of a title by a stranger which is superior or paramount to that of the landlord. The putting of the tenant out of possession by the act of a stranger without title is not an eviction, and in no way affects the landlord's right to hold the tenant for rent. An eviction by act of the landlord may be either the forceful ousting or exclusion of the tenant by the landlord's direct act, or it may be the forcing of the tenant to quit the premises because of the maintenance of a nuisance on adjoining premises by the landlord of such a nature that the premises are rendered unfit for occupancy, or which so interferes with the tenant's enjoyment that he is forced, acting as a reasonable man, to quit the premises, or where the tenant is so forced to quit because of a failure on the part of the landlord to discharge a duty which he owes to the tenant. Evictions of this kind are frequently called constructive. These various kinds of ouster and their effect on the tenant's obligation to pay rent will be separately considered.¹

9. § 223, N. Y. Real Prop. L. See statutes in the various states.

1. In this connection it should be remembered that if the tenant is not permitted to take possession at the beginning of his term because of the act or fault of the landlord, or because of a paramount title, he may repudiate the lease and will not be

liable for rent. See § 163, *ante*. *Mechanics' & Traders' Fire Ins. Co. v. Scott*, 2 Hilton (N. Y.) 550; *Duncan v. Maloney*, 115 Ill. App. 522. In *Brandt v. Phillippi*, 82 Cal. 62, there is *dicta* to the effect that the landlord must give possession, and cannot recover rent if the tenant is kept out by a stranger without right, though

§ 182-a. Eviction by Act of the Landlord; Effect on Rent.

— To constitute an eviction there must be an ouster of the tenant by which he is deprived of the possession and enjoyment of some part of the thing demised. An entry and trespass committed by the landlord, without depriving the tenant of the possession and enjoyment of the premises, is not an eviction. Thus an entry of a contractor engaged in making an excavation immediately adjoining the building leased to the tenant, for the purpose of strengthening and supporting the walls of the building, under a statute requiring this to be done where excavations beyond a certain depth are to be made, upon securing the consent of the owner of the building, is not such an interference as would

the general rule is *contra*, the tenant being bound in such case to recover the premises from the stranger. See cases above cited, also *Ward v. Edesheimer*, 43 N. Y. St. Repr. 138; *McKinney v. Holt*, 8 Hun (N. Y.) 336.

In *Harris v. Greenberger*, 50 App. Div. (N. Y.) 439, a provision in the lease that rent was to be paid "before possession is delivered" to the tenant, and that the tenant should be permitted to store goods on the premises before the beginning of the term, imported an express contract on the landlord's part to give possession, and the tenant having been kept out by a third party without right, the landlord could not recover rent.

Keeping the tenant out of part of the premises has the same result. *Smith v. Barber*, 96 App. Div. (N. Y.) 236, and *O'Brien v. Smith*, 37 N. Y. St. Repr. 41, the court stating in both cases that if the tenant takes possession of part of the premises he waives the landlord's breach of condition in failing to give possession to all, and is liable for the entire rent,

with the right to counterclaim or set-off for such partial exclusion. It would seem on principle that the entire rent should be suspended in such case where the tenant is excluded by act of the landlord, and *pro tanto* when he is excluded by paramount title, as in the case of eviction after entry, he not receiving the land out of which the rent issues because of the fault or failure of title of the landlord. Such is the general rule. *Moore v. Mansfield*, 182 Mass. 302; *McClurg v. Price*, 59 Pa. St. 420. *Contra*, supporting the theory of waiver by the tenant, *Prior v. Kiso*, 81 Mo. 241. See, also, *Reed v. Reynolds*, 37 Conn. 469, holding that if the tenant consents to the holding of part of the premises by the landlord such holding is no defense to an action for rent.

The tenant must demand possession; the holding of possession by the landlord until such demand is not a defense to the action for rent. *Millie Iron M. Co. v. Thalman*, 34 App. Div. (N. Y.) 281.

amount to an eviction, though authorized by the landlord.² If the tenant refuses such consent, thereby freeing the contractor from any duty of strengthening or supporting the walls of the building, and the making of the excavation so damages the walls as to render the building uninhabitable, the tenant is not freed from the obligation of paying rent as he otherwise would be—because by his refusal he is responsible for the condition so created.³

The effect of an eviction of the tenant by act of the landlord, whether the eviction is from the whole or only a part of the leased premises, is to suspend the entire rent as long as the eviction continues.⁴ It is presumed that the eviction has continued during the entire balance of the term unless the landlord shows affirmatively that he has restored the premises to the tenant.⁵ In such case the tenant may quit the premises altogether, refusing to return, but if he does return, and the premises are restored to him, rent is no longer suspended, and he must pay rent accruing thereafter in accordance with the terms of the lease.⁶ The reason why rent is suspended by an eviction in any of its forms is that the rent issues from the land, and if the tenant is deprived of the land by the landlord, the landlord shall not be entitled to any rent while such deprivation continues.⁷ Though the tenant is ousted from only a part of the premises, retaining possession of the balance, the en-

2. *McKenzie v. Hatton*, 141 N. Y. 423; *Bennett v. Bittle*, 4 Rawle (Pa.) 6; *Johnson v. Oppenheim*, 55 N. Y. 339.

3. *Johnson v. Oppenheim*, 55 N. Y. 280.

4. Cases in preceding notes; also, *Christopher v. Austin*, 11 N. Y. 216; *Royce v. Guggenheim*, 106 Mass. 201; *Smith v. McEnany*, 170 Mass. 26; *Tilly v. Moyers*, 43 Pa. St. 404; *Wright v. Latlin*, 38 Ill. 297, and cases in notes following.

5. *Lewis v. Payn*, 4 Wend. (N. Y.)

6. *Co. Litt.*, 319a; *Smith v. McEnany*, 170 Mass. 26 (in case of partial eviction, tenant remaining in possession, covenant to repair or the other incidents of the lease are not affected; rent alone is suspended); *Tilly v. Moyers*, 43 Pa. St. 404 (rent already due is not affected).

7. See cases cited in preceding notes.

tire rent is suspended, and no action for use and occupation can be maintained, the courts refusing to make an apportionment for the benefit of a wrongdoer.⁸ Where the landlord has not committed an act of ouster, but the tenant is ousted from a part of the premises only because of an outstanding paramount title, or in other words, because of a defect in the landlord's title, if the tenant continues in possession of the rest of the leasehold premises he will be required to pay a proportionate part of the rent, because in such case the landlord is not a wrongdoer, and an apportionment of the rent will be made for his benefit.⁹

Cases of so-called constructive eviction arise where the tenant is forced to quit the premises because of a wrongful act of the landlord's such as the maintenance of a nuisance on adjoining property, or the breach of some duty owed by the landlord to the tenant which so interferes with his possession and enjoyment as to force him, acting as a reasonable man, to move from the premises.¹⁰ It is nec-

8. *Christopher v. Austin*, 11 N. Y. 216, and cases in preceding notes.

9. See § 183 and cases thereunder.

10. *Edgerton v. Page*, 20 N. Y. 281 (nuisance maintained by landlord on upper floor retained by him, defective water pipes leading to sewer. Not breach of covenant of quiet enjoyment, as tenant remained in possession. Action for nuisance could not be counterclaimed, in action for rent, under New York Code). *Dyett v. Pendleton*, 8 Cow. (N. Y.) 727, and 4 id. 581 (maintenance of house of ill fame by landlord on adjoining premises forcing tenant to move); *Tallman v. Murphy*, 120 N. Y. 345 (nuisance forcing tenant to move, consisting of gas escaping into tenant's rooms through flues, violent explosions caused by water tank on roof. the court holding that if the landlord

commits or suffers acts, or fails to perform a duty owed to the tenant, making the premises untenable and the tenant moves, an eviction has taken place); *Krausi v. Fife*, 120 App. Div. (N. Y.) 490; (nuisance, plumbing of apartment house out of repair—waste water from other apartments emptied into fixtures in defendant's apartment); *Snow v. Pulitzer*, 142 N. Y. 263 (tenant forced to move by tearing down of wall between adjoining building and building leased); *Skally v. Shute*, 132 Mass. 367 (nuisance).

Other cases illustrating evictions of this character are *Stewart v. Forst*, 15 Misc. (N. Y.) 621; *Sully v. Schmidt*, 147 N. Y. 248; *Lindwell v. May*, 111 App. Div. 457; *Brown v. Holyoke Water P. Co.*, 152 Mass. 463; *Miles v. Janvrin*, 196 Mass. 431.

essary that the tenant move out; if he remains in possession that fact proves conclusively that he has not been forced out by the landlord's wrong, and his only remedy will be in an action based on the nuisance, or breach of covenant, as the case may be.¹¹

It is stated in some of the cases that the intent of the landlord to oust the tenant must appear, but that such intent will ordinarily be inferred from the act of ouster.¹² As far as this rule has any significance it can only mean that the landlord is responsible for the natural consequences of his acts. The ouster must result from the wrongful act or default of the landlord; if the wrongful act or default is his, he is responsible for it, and rent is suspended.

Eviction, whether in whole or in part, has no effect on rent which has become due before the eviction, even though it was payable in advance, and the eviction took place the day after the eviction or during the period for which the rent was so payable.¹³ Rent is not suspended until the eviction, and as it has already accrued, it is clear that the subsequent eviction cannot cause its suspension. The tenant may, however, counterclaim or set off breach of the covenant of quiet enjoyment against the claim for rent, which amounts to the same thing in practical result.¹⁴

See § 160, *ante*, on breach of the covenant of quiet enjoyment, an eviction amounting in each case to a breach of that covenant. Failure to supply steam heat, in a steam-heated apartment, was held to amount to an eviction, the tenant being forced to move, in *Jackson v. Paterno*, 128 App. Div. (N. Y.) 424.

11. *Edgerton v. Page*, 20 N. Y. 281; *Boreel v. Lawton*, 90 N. Y. 293; *DeWitt v. Pierson*, 112 Mass. 8, and cases in preceding note.

12. *Skally v. Shute*, 132 Mass. 367.

13. *Giles v. Comstock*, 4 N. Y.

270; *Stein v. Rice*, 23 Misc. (N. Y.) 348; *Gugel v. Isaacs*, 21 App. Div. (N. Y.) 503 (land taken by condemnation proceedings after rent payable in advance had accrued, and during quarter for which rent was so payable. Liability to pay not affected); *Hunter v. Reiley*, 43 N. J. L. 480. In *Sutton v. Goodman*, 194 Mass. 389, and *Hall v. Middleby*, 197 Mass. 485, the court held that such rent could not be collected, in the latter case giving failure of consideration as the reason.

14. See cases in preceding note.

§ 183. **Eviction by Paramount Title.**—Total eviction by one having a title paramount to the landlord's suspends the entire rent, exactly as in cases of eviction by wrongful act or default.¹ But in the case of partial eviction by paramount title rent is apportioned, provided the tenant continue in possession of the part to which his landlord has good title, the rent being suspended only to the extent of an amount proportioned to the rental value of the part of the premises of which the tenant has been deprived.² As stated heretofore, failure of title is not regarded as an affirmatively wrongful act; the landlord is therefore not treated as a wrongdoer and is not subjected to the penalty of losing the entire rent, but only a proportionate part, the tenant continuing to pay a proportionate rental for the part of the premises which he actually possesses and enjoys. The tenant is not obliged, however, to continue in possession of only a part; he may quit the premises, thus freeing himself from all obligation for rent accruing thereafter.³

When the tenant discovers that his landlord has no title and that a third person is the owner of the leased premises, he need not wait to be actually ousted by legal proceedings; he may accept a lease from the true owner, holding under him, the transaction amounting to an eviction exactly as though he had been ousted as the result of an action at law, and had thereafter rented the premises from the true owner. In such case, however, he acts at his peril, there being no eviction unless the third person whom

1. *Morse v. Goddard*, 13 Met. (Mass.) 177. See cases under § 182.

2. *Fillebrown v. Hoar*, 124 Mass. 580; *Morse v. Goddard*, 13 Met. (Mass.) 177; *Home Life Ins. Co. v. Sherman*, 46 N. Y. 370; *Carter v. Burr*, 39 Barb. (N. Y.) 59; *Lawrence v. French*, 25 Wend. (N. Y.) 445; *Christopher v. Austin*, 11 N. Y. 216.

In *Blair v. Claxton*, 18 N. Y. 529, the lease covering lands and water rights, deprivation of water rights on the part of the tenant was held to entitle him to a proportionate reduction of rent.

3. *Seabrook v. Moyer*, 88 Pa. St. 417; *Smith v. McEnany*, 170 Mass. 26, and cases in preceding notes.

he so accepts as landlord is in fact the real owner of the premises.⁴

§ 184. Taking of Leasehold Premises by Eminent Domain.—The taking of the leasehold premises for a public use under the power of eminent domain, and the consequent ending of the term, is in no sense an eviction for which the landlord is responsible, and therefore he is not liable to the tenant for breach of the covenant of quiet enjoyment. The tenant is ousted through no wrongful act or default or failure of title on his part.⁵ But where the entire premises are taken the leasehold estate is ended, and the rent issuing therefrom necessarily comes to an end at the same time. Therefore where the entire premises are so taken the tenant is freed from the obligation of paying rent thereafter falling due.⁶ In cases where only part of the premises are taken, the tenant remaining in possession of the rest, there is authority for the rule that the rent is not suspended in part, but continues unaffected, the tenant being compensated by the award made to him in the condemnation proceedings incident to the taking of the land.⁷ Indeed, one case holds that the same principle applies in cases where the entire premises are taken.⁸ The difficulty with this view is that the tenancy is at an end, just as in the case of a merger or surrender of the term, the term merging with the fee in the state, city or other body corporate which has acquired title by eminent domain. Rent is necessarily extinguished with the ending of the term to which it is inci-

4. *Morse v. Goddard*, 13 Met. Mass. 29; *Dyer v. Wightman*, 66 Pa. (Mass.) 177; *Moffatt v. Strong*, 9 St. 425; *Uhler v. Cowen*, 192 Pa. St. Bosw. (N. Y.) 57. 443; *Corrigan v. Chicago*, 144 Ill. 537.

5. *Folts v. Huntley*, 7 Wend. (N. Y.) 210; *Patterson v. City of Boston*, 20 Pick. (Mass.) 159, and cases cited in following notes under this section. 7. *Stubbins v. Evanston*, 136 Ill. 37; *Corrigan v. Chicago*, 144 Ill. 537; *Patterson v. Boston*, 37 Mass. 159.

6. *Lodge v. Martin*, 31 App. Div. (N. Y.) 13; *O'Brien v. Ball*, 119 Y.) 210. 8. *Folts v. Huntley*, 7 Wend. (N. Y.) 210.

dent. Furthermore such a rule is practically unjust in that the award paid to the tenant, in so far as it would include the rent for the balance of the term, might never be actually paid to the landlord, who would be put to the trouble of collecting it from the tenant as it would accrue under the lease, with the danger of being able to collect nothing in case of the tenant's insolvency. By making the award on the basis of the tenancy terminating on the taking of the land, each party gets exactly what he is entitled to, with no further obligation to pay rent thereafter. This is the modern rule, by statute in some cases, and by decision in others. On principle there is no basis for any other view.⁹

Where the land is not taken absolutely, but an easement for a street or highway is acquired, the landlord and tenant retaining their interests subject to the easement, there is the theoretical objection that the tenancy is not ended, and therefore rent is not extinguished. As a practical matter such ownership subject to the easement is valueless, and the tenancy, in so far as the land taken is concerned, is ended. The rent should, therefore, be treated as extinguished to an extent corresponding to the value of the land taken. Even the theoretical objection to this rule disappears, as pointed out in a recent work, if it is made to apply as of the time the tenant is actually dispossessed of the part so taken. In such case he is legally deprived of part of the land out of which the rent issues, not by any failure of title on the part of the landlord, but by a superior right in the state, and as in the case of an eviction, the rent should

9. Eng. Land Clauses Act, 1845, §§ 115-118; § 996 of the charter of the city of New York provides that the lease in such case is terminated either entirely or *pro tanto*, as the case may be, rent being extinguished entirely or in proportion to the value of the part of the land taken. See *Matter of Daly*, 29 App. Div. 286; *Lodge v. Martin*, 31 App. Div. 13.

For decisions to the effect that the rent will be apportioned in the case of a taking of part of the leasehold premises, see *Uhler v. Cowen*, 192 Pa. St. 443; *City of Baltimore v. Latrobe*, 101 Md. 621; *Biddle v. Hussman*, 23 Mo. 597; *Kingsland v. Clark*, 24 Mo. 24.

be extinguished in part since the tenant is deprived of part of the thing out of which the rent issues.¹⁰

The tenancy ends when the proceedings in condemnation are complete, viz.: when the report of the commissioners has been confirmed.¹¹

The taking of the lease expressly subject to the taking of the land by eminent domain,¹² and a provision that the tenancy shall end upon the taking of the property in whole or in part by condemnation proceedings,¹³ are construed as depriving the tenant of any part of the award, the tenancy ending at once, and the award for the entire fee going to the landlord.

As in the case of eviction, such ending of the term does not affect rent already due, even though it be payable in advance, and the land is taken during the period for which the rent is payable.¹⁴

§ 185. Surrender; Effect on Rent.— A surrender is a conveyance or transfer of an estate for life or for years to the holder of the first estate in reversion or remainder.¹ The nature and use of a surrender as a conveyance will be dis-

10. Tiffany, *Landlord and Tenant*, pp. 1186, 1187. See *Emmes v. Feeley*, 132 Mass. 346; *Devine v. Lord*, 175 Mass. 384.

11. *Edmonds v. Boston*, 108 Mass. 538.

12. *Matter of the Mayor of New York*, 168 N. Y. 254.

13. *Goodyear Shoe Mach. Co. v. Boston Terminal Co.*, 176 Mass. 115.

The tenant need not wait till actually dispossessed. He may quit the premises and be freed from liability for rent as soon as title has been taken by the city or state, as he may then be ousted at any time. *Payne v. Schallhamer*, 30 Misc. (N. Y.) 755;

Hudson Co. Brd. etc. v. Emmerick, 57 N. J. Eq. 575. But see cases cited in note 10, *supra*.

14. *Giles v. Comstock*, 4 N. Y. 270; *Gugel v. Isaacs*, 21 App. Div. (N. Y.) 503.

1. *Co. Litt.*, 378a; *Schieffelin v. Carpenter*, 15 Wend. (N. Y.) 400, in which case it is stated, "A surrender is defined to be a yielding up of an estate for life or years to him who hath the immediate estate in reversion or remainder wherein the estate for life or years may drown by mutual agreement." See cases cited in notes under this and following sections.

cussed in another connection.² As affecting the law of landlord and tenant, a surrender is the giving up by a tenant of his term to his landlord, the term merging with the landlord's reversion. Rent necessarily ends when the term out of which it issues is thus brought to an end.³ As in the case of eviction, a surrender does not affect rent which has accrued before the surrender takes place, though payable in advance for a rental period which has not elapsed at the time of the surrender.⁴

§ 186. Express Surrender.—A surrender by voluntary act of the parties is an express surrender. Before the statute of frauds a surrender by parol was valid and effectual since it involved the giving up and conveyance to the reversioner or remainderman of a present estate transferable by livery rather than by grant. The statute of frauds, however, provided that no freehold estate or estate for a term of years, or any uncertain interest in lands, tenements or hereditaments could be assigned, granted or surrendered except by deed or note in writing signed by the person conveying, assigning a surrendering or by his agent duly authorized in writing, or by act or operation of law.⁵ Thereafter, under this provision every surrender expressly intended to operate as such by the parties required a writing, whether of a life estate or a term of years, including leasehold es-

2. See under Deeds and Conveyances, § 313, *post*.

3. *Underhill v. Collins*, 132 N. Y. 269; *Amory v. Kannofsky*, 117 Mass. 351; *Miller v. Dennis*, 68 N. J. L. 320, and cases cited under this and following sections relating to surrender.

4. *Sperry v. Miller*, 8 N. Y. 336; *Sammis v. Day*, 48 Misc. (N. Y.) 327; *Learned v. Ryder*, 61 Barb. (N. Y.) 552; *Stern v. Murphy*, 102 N. Y.

Supp. 797; *Barkley v. McCue*, 25 Misc. 738.

For like reasons the landlord cannot recover any part of the rent payable at the end of a period when the surrender takes place during the period, in the absence of an express provision for such apportionment. *Curtiss v. Miller*, 17 Barb. (N. Y.) 477; *Cameron v. Little*, 62 Me. 550.

5. 29 Car. 2, c. 3, § 3.

tates for three years or less, though such leaseholds could be created by parol.⁶

Surrenders by act or operation of law were expressly excepted from the operation of the statute. As distinguished from an express surrender intended to operate as such by the parties, a surrender by act or operation of law is accomplished as a legal result following from the acts of the parties, the law declaring a surrender to have been made as the legal result of conduct on their part necessarily inconsistent with the continuance of the term, whether the parties intended a surrender or not.⁷

In the United States the English statute has been substantially followed by similar statutes in several states.⁸ In New York, § 242 of the Real Property Law provides that an estate or interest in real property, other than a lease for a term not exceeding one year, can not be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing subscribed by the person so granting, assigning or surrendering, or by his agent duly authorized in writing. Under this statute a lease for a year or less may be surrendered or assigned, as well as created, by parol.⁹ In several states the provisions of the New York statute have been followed in substantially the same form.¹⁰

A surrender of a term involves something more than the surrender, destruction or cancellation of the lease by which

6. *Rowan v. Lytle*, 11 Wend. (N. Y.) 616, and cases in notes immediately following.

7. See § 187, *post*.

8. Mass. Rev. St. 1902, c. 127, § 3; N. H. Pub. St. 1901, c. 137, § 12; Vt. Pub. St. 1906, § 2582; N. J. Gen. St. p. 1602, § 2; Pa. Act, Mar. 21, 1772. See, also, statutes of Missouri, Arkansas and Florida.

9. *Smith v. Devlin*, 23 N. Y. 363, holding that a lease with an unex-

pired term of a year or less may be surrendered by parol.

10. Mich. Comp. L. 1897, § 9509; Wis. Rev. St. 1898, § 2302; Minn. Rev. L. 1905, § 3487. See, also, statutes to same effect of Nebraska, Montana, Nevada and Utah. For references to and discussion of statutory provisions on this point in other states, see 2 Tiffany Landl. & Ten. 1314.

it was created. It involves a reconveyance of the term to the landlord, either by a writing under the statute if an express formal surrender is intended, or by such conduct by the parties as will amount to a surrender by act of the law irrespective of their intent. The lease, as we have seen, is primarily and necessarily a conveyance by which an estate has been created and transferred to the tenant, and a mere surrender, destruction or cancellation of it cannot amount to a reconveyance of the estate under the statutes requiring that an express surrender shall be in writing.¹¹ It should be noted, however, that a permanent abandonment of possession by the tenant and the resumption thereof by the landlord on his own account is such conduct as amounts to a surrender by act and operation of law, whether the parties intend a surrender or not, and therefore such surrender and resumption of possession, without a writing, is a perfectly effectual means of accomplishing a surrender, though it be, in effect, a surrender by parol, the parties intending it to operate as such. So by purposely taking the steps which result in a surrender by act and operation of law the parties may voluntarily accomplish a surrender without a writing, narrowing the statute in its practical application to the exceptional case where there is no giving up and resumption of possession accompanying the surrender, or other act or acts of the parties amounting to a surrender by operation of law.¹² It follows that the giving up of possession is not essential to a valid express surrender made in writing pursuant to the statute.¹³

The effect of an express surrender upon a subtenant who

11. *Rowan v. Lytle*, 11 Wend. (N. Y.) 616; *Smith v. McGowan*, 3 Barb. (N. Y.) 304; *Hatch v. Hatch*, 9 Mass. 307.

In absence of a statute requiring a writing, a cancellation together with the conduct of the parties showing intent to effect a surrender thereby, au-

thorizes a finding of an express surrender as a matter of fact. *Brewer v. Nat. Bld. Ass'n*, 166 Ill. 221.

12. See sections following on Surrender by Operation of Law.

13. *Co. Litt.* 57; *Shep's Touchstone*, 307.

is not a party thereto is to make him tenant of the original landlord, his rights otherwise continuing as before.¹⁴

§ 187. Surrender by Act or Operation of Law.— Where both landlord and tenant take some action with relation to the land covered by the lease which is necessarily inconsistent with the continuing of the term, so that the term cannot continue to exist at the same time with the new relation or estate created as a result of their acts, a surrender by act and operation of law results.¹ As the expression indicates, this result does not depend on whether they intend an actual surrender or not, the law declaring that such result follows from their acts irrespective of their intent. Those cases which assert that the surrender in such case depends upon the mutual agreement of the parties are necessarily erroneous, arising out of a failure to understand the distinction between an express surrender, which requires a writing under the statute, and a surrender by act and operation of law. If their acts are not sufficient to amount to such a surrender, their intent to accomplish that result must be ineffectual because an express surrender can be made only by writing under the statute. On the other hand if a surrender results by law from certain acts on their part creating an inconsistent situation, their intent that no surrender shall result must be ineffectual, since the surrender results automatically by operation of law, not by voluntary, and therefore express, acts of surrender on their part.² The principle of estoppel is more usually assigned as the basis of surrender by operation of law.³ It is clear that the requisites of equitable estoppel are absent, since

14. Stat. 4, Geo. II, ch. 28, § 6; N. Y. Real Prop. L., § 226; *Eten v. Luyster*, 60 N. Y. 252.

1. *Gray v. Kaufman Dairy Co.*, 162 N. Y. 388; *Crane v. Edwards*, 80 App. Div. (N. Y.) 333; *Amory v. Kannoffsky*, 117 Mass. 351, and cases cited in notes under § 188.

2. See cases cited in notes following illustrating specific cases of surrender by operation of law under § 188, and cases under § 186 on express surrenders.

3. See § 188.

neither party is misled by the position taken by the other, both knowing all the facts; furthermore the surrender results from their mutual action. In the usual case no question of estoppel by deed can arise. It is better to treat it as an independent rule of law attaching to the status of landlord and tenant, that where the parties have by their joint act in actual fact destroyed the term by creating another interest necessarily inconsistent with it, or by actual relinquishment of possession permanently by the tenant and acceptance thereof by the landlord, the term has in fact been merged with the reversion, both parties are bound by what they have done, and neither one will be permitted thereafter to change his position by asserting that the leasehold term still continues.

§ 188. Cases in Which Surrender by Act or Operation of Law Takes Place.—The making of a new lease between the same parties to take effect before the expiration of the original term works a surrender by operation of law, since the new lease is necessarily inconsistent with the continuing of the original term.⁴ The new lease results in a surrender though it be by parol and the original lease is in writing under seal, since the term created by it is necessarily inconsistent with the term created by the first lease.⁵ Some confusion in the cases has resulted from regarding such a lease as an instrument in revocation of the prior instrument under seal, it having been held that such an instrument could be revoked only by an instrument under seal.⁶ It is,

4. *Ives Case*, 5 Coke 11a; *Schieffelin v. Carpenter*, 15 Wend. (N. Y.) 400; *Smith v. Kerr*, 108 N. Y. 31; *Chamberlain v. Dunlop*, 126 N. Y. 45.

Where the new lease is to take effect only on the expiration of the first lease there is, of course, no surrender. *Tracy v. Albany Exch. Co.*, 7 N. Y. 472.

5. *Schieffelin v. Carpenter*, 15

Wend. 400; *Smith v. Kerr*, 108 N. Y. 31; *Chamberlain v. Dunlop*, 126 N. Y. 45.

6. *Leavitt v. Stern*, 159 Ill. 526 (dicta, since the new lease given by parol for six years was void under the statute and therefore could not amount to a surrender by operation of law).

of course, obvious that a surrender in no way involves the revocation or cancellation of the original lease; it involves the reconveyance of the term created by the lease, such reconveyance resulting by operation of law from the creating of a new lease covering the same term in whole or in part, the new lease being valid only on the basis of a retransfer of the original term to the landlord.⁷

Where, under the first lease, the tenant is entitled to the value of buildings or other improvements, it is held that the making of a new lease including the balance of the unexpired term does not amount to surrender so as to deprive the tenant of his right to compensation for the improvements, since under the circumstances the tenant could not have intended a merger of the old term with the new which would have that effect. There are several cases of this nature apparently laying down the principle that no surrender results through the new lease unless the parties so intended.⁸ In each case, however, the result reached by the court is quite consistent with the holding that a surrender necessarily results, irrespective of the parties' intent, if a new lease different in its terms and not merely in substitution for the old lease as a matter of form, is entered into between the parties covering the unexpired portion of the original term. In the case first above referred to⁹ the surrender of the original term should not be held

7. See cases in notes 4 and 5, *supra*.

8. *Van Rensselaer's Heirs v. Pen-nimann*, 6 Wend. (N. Y.) 569; *Witmark v. N. Y. El. R. Co.*, 76 Hun (N. Y.) 302; *Smith v. Kerr*, 108 N. Y. 31 (dicta as to intent as a requisite. The new lease was void because by parol, and therefore no surrender resulted).

9. *Van Rensselaer's Heirs v. Pen-nimann*, 6 Wend. (N. Y.) 569.

In *Witmark v. N. Y. El. R. Co.*, 76 Hun (N. Y.) 569, the new leases were

taken out for the balance of the old term, for a special purpose, but without any purpose of changing the rights of the parties under the original term. This was in no true sense the creating of a new relationship of landlord and tenant, so as to deprive the tenant of his right to damages against the defendant arising out of the building of an elevated railroad structure after the old lease was made, but before the new leases were executed. The old term was con-

to release the landlord from his obligation to pay for improvements made by the tenant during the term, though the new lease contained no such provision. The mere ending of the term by surrender could not have the effect of discharging the landlord from a contractual obligation arising under the terms of the lease which created the term. Such a surrender ends the estate of the tenant in the land; it does not end his right to hold the landlord on any covenant or promise contained in the lease, nor should it deprive the tenant of his right to take away any fixture erected by him, which was removable by him before the end of the term, though the weight of authority is that the tenant has no right to remove such fixtures under a new lease which is to take effect on the expiration of the original term.¹⁰

If the new lease is void for any reason, as because it is not in writing as required by the statute, no surrender results, since no estate inconsistent with the original term is created.¹¹ So, if the tenant does not receive under the new lease the term which he bargained for, as where an outstanding claim of dower exists, or the share of an infant or other tenant in common in the property is not included in the lease, the tenant may repudiate it, and insist upon the original tenancy as continuing unaffected by the new lease.¹²

tinued in another form under the new leases, and whether a surrender resulted or not, the liability of the railroad was in no way affected by the making of the new leases.

10. See § 58, *ante*.

11. *Schieffelin v. Carpenter*, 15 Wend. (N. Y.) 400; *Coe v. Hobby*, 72 N. Y. 141; *Smith v. Kerr*, 108 N. Y. 31.

12. *Chamberlain v. Dunlop*, 126 N. Y. 45; *Powell v. F. C. Lynde Co.*, 49 App Div. (N. Y.) 286 (in this case the court held that the defendant

might set up fraud in inducing the second lease as an equitable counterclaim, equity cancelling the second lease and restoring the first because of the fraud.

A contract to sell the leased premises to the tenant amounts to surrender by operation of law, the tenant's possession being presumptively that of a vendee in possession, in equity the owner of the property. *Lewis v. Augermiller*, 89 Hun (N. Y.) 65; *Burnett v. Scribner*, 16 Barb. (N. Y.) 621. In *Bostwick v. Frankfield*, 74

The permanent relinquishment of possession by the tenant to the landlord, who enters and occupies for himself, is a state of facts so inconsistent with the term as to amount to a surrender by operation of law.¹³ Whatever may be said of the soundness and expediency of this rule, it is well established as part of the law. As pointed out in a preceding section, this rule renders the statute requiring a writing for express surrenders of narrow application, since an intentional parol surrender is effectuated by the tenant's quitting the premises with the permanent intention of giving them up, and the landlord's resuming possession on his own account. To amount to a surrender the tenant must quit the premises permanently; if he leaves the premises unoccupied, going elsewhere for some temporary purpose, there is no surrender, the landlord having no right to resume possession.¹⁴ The landlord must take possession for himself; if he enters merely to care for the property, to make repairs, or the like, or if he take possession solely in behalf of the tenant, refusing his proffered relinquishment thereof, no surrender takes place.¹⁵ The intent of the parties is important and essential here, in order to determine whether the tenant has relinquished possession permanently, and whether the landlord has accepted such relinquishment in extinguishment of the term. Many of the cases speak of such a transaction as a "surrender" made voluntarily by the tenant and accepted by the landlord. It is, of course, not a surrender in the technical sense, since a

N. Y. 207, the tenant continued to pay rent, and the court held that no surrender resulted, it being clear that the tenant continued in possession as tenant, not as vendee in possession.

13. *Talbot v. Whipple*, 96 Mass. 177; *Dennis v. Muller*, 68 N. J. L. 320, and cases cited in following notes.

14. *Larkin v. Avery*, 23 Conn. 304; *Ayr. v. Philadelphia Co.*, 193 Pa. St.

451 (the question of whether a permanent abandonment has taken place or not is for the jury); *Hough v. Brown*, 104 Mich. 109.

15. *Witmark v. N. Y. El. R. Co.*, 76 Hun 302, aff'd 149 N. Y. 393; *Requa v. Domestic Pub. Co.*, 11 Misc. (N. Y.) 322; *Miller v. Becker*, 96 Pa. St. 182; *Chandler v. Hinds*, 135 Wis. 43; *Meeker v. Spalsburg*, 66 N. J. L. 60.

voluntary surrender must be in writing; it is rather the surrender of possession and acceptance thereof with the intent of ending the term to which the courts refer, the surrender arising by operation of law from the result, inconsistent with the term, which the parties have created by their acts. The sending of the keys to the landlord and the acceptance thereof by him, though evidence of a surrender which would be conclusive if the landlord takes possession, and uses the premises on his own account for his own interest, is not of itself conclusive, and will not amount to a surrender when the landlord at the time expressly refuses to accept possession on his own account, but takes charge of the premises in behalf of the tenant, informing the tenant, expressly or impliedly, that he will be held for the entire rent.¹⁶ Under such circumstances an attempt to lease or to sell the premises will not amount to a surrender, the landlord having only attempted to accomplish that, which if successful would result in a surrender by operation of law.¹⁷

The permanent relinquishment of the premises by the tenant followed by an entry and reletting by the landlord, of itself amounts to a surrender, unless the tenant was notified that the premises would be relet in his behalf, and that he would be held for the rent less the amount received from the reletting.¹⁸ It is clear that the new term is nec-

16. *Reeves v. McComeskey*, 168 Pa. St. 571; *Underhill v. Collins*, 132 N. Y. 269; *Dorrance v. Bonesteel*, 51 App. Div. (N. Y.) 129; *Joslin v. McLean*, 99 Mich. 480.

17. *Dorrance v. Bonesteel*, 51 App. Div. (N. Y.) 129; *Miller v. Becker*, 96 Pa. St. 182; *Reeves v. McComeskey*, 168 Pa. St. 571.

Acceptance of keys, together with other facts showing that the landlord has resumed possession on his own account in exclusion of any right of the tenant to resume possession will

amount to a surrender by act or operation of law. *Bedford v. Terhune*, 30 N. Y. 461; *Gray v. Kauffman, etc. Co.*, 162 N. Y. 388; *Auer v. Penn*, 99 Pa. St. 370; *Welcome v. Hess*, 90 Cal. 507; *Dagett v. Champney*, 122 App. Div. (N. Y.) 254.

18. *Goldsmith v. Schroeder*, 93 App. Div. (N. Y.) 206; *Gutman v. Conway*, 45 Misc. (N. Y.) 363; *Dagett v. Champney*, 122 App. Div. (N. Y.) 254; *Brown v. Cairns*, 107 Ia. 727; *Hesseltine v. Leavey*, 16 Mo. 212.

essarily inconsistent with the old term, and must result in a surrender by act and operation of law unless the reletting is with the express or implied consent of the tenant. In some cases it seems to be settled that the landlord may relet and hold the tenant for the difference in rent where the tenant has moved out, tendered the keys, and has made clear his intent to abandon all interest in the property and to repudiate his obligation to pay rent thereafter accruing, whether notice be given him or not, provided it appear that the landlord had resumed possession and had relet in order to reduce the liability for rent on the tenant's part.¹⁹ The principle on which these cases depend seems to be that in such case of open repudiation of further liability the landlord is not compelled to submit to the alternative of leaving the premises without a tenant or releasing the tenant from his obligation; that the law will in such case presume that the tenant consents, or more accurately, that irrespective of the consent of a tenant repudiating his obligation, the landlord may relet and still hold the tenant for the difference, a principle that squares with common sense, and also with the technical aspects of the situation when it is remembered that a surrender by operation of law is an arbitrary rule created by the courts to work out justice, based on principles akin to estoppel. There is no question that the tenant's course amounts to a surrender if the landlord chooses to accept it as such, but in view of the situation created by the tenant in repudiating his obligation it is highly technical to say that the act of the landlord in reletting the premises to reduce the tenant's liability for rent may be taken advantage of as a surrender by the tenant whose wrongful conduct has created the situation. Though technically the new lease is inconsistent with the old lease,²⁰ since the necessity for it has been created by the tenant's

19. *Auer v. Penn*, 99 Pa. St. 370; *Clothing Co.*, 184 Ill. 421; *Auer v. Humiston, K. & Co. v. Wheeler*, 175 Ill. 514; *Marshall v. John Goss* 20. *Welcome v. Hess*, 90 Cal. 507.

repudiation of his obligation, justice requires that he be estopped from setting up the new lease as a surrender by operation of law rather than that the landlord be estopped from setting up the old lease because of the new one. On this aspect of the case notice to the tenant would be immaterial in any case where he has quit the premises in repudiation, express or implied, of his obligations under the lease.

In New York it has been held that consent on the part of the tenant to the making of a new lease must be shown, otherwise the new lease is a surrender, and such consent will not be inferred from the sending of a written notice to the tenant that the premises will be relet at his risk, the tenant not having replied,²¹ though such consent would, apparently, be implied if such notice had been given by parol to the tenant in person, provided he made no objection.²² It is submitted that this position is highly technical in that it is based on the application of the rule of surrender by operation of law without regard to its manifest spirit and purpose. The rule itself, as we have seen, is arbitrary, and so far as it is based on any legal or equitable principle it is founded on estoppel. As pointed out above, the tenant repudiating his obligations should be estopped from asserting a failure to give his consent to the reletting. There is no reason why in equity or common sense the landlord should be prevented from asserting the old lease merely because he has sought to reduce the tenant's repudiated obligation thereunder.²³

21. *Gray v. Kaufman Dairy Co.*, 162 N. Y. 388.

22. *Underhill v. Collins*, 132 N. Y. 269.

23. See note 19, *supra*. In *Welcome v. Hess*, 90 Cal. 507, the reletting was for a term extending beyond the term of the original lease, and therefore amounted to a surrender by

operation of law, the reletting not being in behalf of the tenant. In *Hasseltine v. Seavey*, 16 Me. 212; *Daggett v. Champney*, 122 App. Div. (N. Y.) 254, and *Witman v. Watry*, 31 Wis. 638, the reletting was without notice to the tenant, and though the court does not state that notice to the tenant would have prevented the relet-

Notice to the tenant should be material only as showing abandonment of the premises and repudiation of the lease, and as showing that the reletting was actually on account of the tenant. When these facts are admitted or are proved by other evidence, notice to the tenant should be held to be immaterial.

In summary, the cases are agreed generally that in case of permanent abandonment by the tenant and reletting by the landlord a surrender by operation of law takes place unless the landlord proves that the reletting was in behalf of the tenant, and not in acceptance of the tenant's abandonment nor in discharge of the rent, and the burden is upon the landlord to prove this. The weight of authority is that this can be proved and the landlord's action explained only by proof of his giving notice to that effect to the tenant, though some cases hold that if the landlord proves that in fact he relet the premises in behalf of the tenant, who had abandoned the premises in repudiation of his obligations under the lease, such reletting being made to reduce the rent for which the tenant would be liable, there is no surrender though no such notice was given. On principle this view is sound, and is more in accord with justice and practical good sense. In New York the tenant's affirmative consent to the reletting seems to be necessary according to the Gray case, or his silence under circumstances amounting to such consent. This view does not seem to have been

ting from amounting to a surrender in each case, on the other hand these cases are not authority that such notice would not prevent that result. They merely stand for the general rule, which is sound, that such reletting unexplained amounts to a surrender by operation of law. The weight of authority undoubtedly is that unless the tenant be given notice the letting amounts to such surren-

der, though the letting was for the purpose of reducing the rent for which the tenant was liable, and was not actually intended as a discharge of the tenant from such liability. See cases cited in note 18, *supra*, also Gutman v. Conway, 45 Misc. (N. Y.) 363; Biggs v. Stueler, 93 Md. 100; Reeves v. McComeskey, 168 Pa. St. 571.

taken elsewhere, and is opposed to several cases decided by the lower courts of that state.

§ 188-a. Express Provision Permitting Reletting.—If the lease contains an express provision that the landlord may relet the premises in behalf of the tenant, and that the tenant shall continue liable for the deficiency in the rent after abandonment of the premises by him, the landlord may, of course, relet in such case and hold the tenant for any deficiency. The tenant would clearly be liable under the express terms of his contract, though the landlord take possession and relet in acceptance of the tenant's abandonment. Though a surrender of the term take place by act and operation of law, the tenant has bound himself for the deficiency in the rent by the express terms of the lease.¹

§ 189. Forfeiture for Breach of Condition.—Tenancies for years, like estates for life and in fee, may be created subject to conditions subsequent, and are subject to the rules of law governing conditional estates which are discussed in detail in another chapter.² Breach of condition by the tenant does not *ipso facto* terminate the tenancy. It gives to the landlord the right to enforce the forfeiture either by an entry or by the starting of an action of ejectment at common law, or by summary dispossession proceedings under the provisions of statutes enacted quite generally in the different states. If the landlord elects to waive the

1. Hurley v. Sehring, 43 N. Y. St. Repr. 240; Jones v. Rushmore, 67 N. J. L. 157; McElroy's Est. v. Brooke, 104 Ill. App. 220.

In such case it is clear that the general rule that a landlord is not obliged to re-enter or relet the premises so as to relieve the tenant *pro tanto* in case of abandonment by the tenant (Becar v. Flues, 64 N. Y. 518, § 142, note 1, *ante*), is modified by

the express agreement of the parties, the landlord being bound to enter and to relet in such case for what he can get, and if he does not do so the tenant must be credited with such amount as the landlord might reasonably have obtained. Bowditch v. Raymond, 146 Mass. 109; International Trust Co. v. Weeks, 203 U. S. 364.

2. See Ch. XII, *post*.

breach by some overt act by which he recognizes the tenancy as continuing, his right to enforce the forfeiture is gone.³ On the other hand, if he elects to enforce the forfeiture either by an entry, the starting of a suit in ejectment, or by summary dispossession proceedings under the statute, the tenancy is brought to an end at that moment, and rent which would otherwise accrue thereafter is extinguished, since rent ends with the tenancy.⁴ The acceptance of rent after breach of the condition is a waiver of the breach,⁵ but if the forfeiture be enforced in any of the ways above stated the landlord may thereafter sue to recover rent which accrued after the breach but before forfeiture was so enforced, since the tenancy does not end until the landlord has elected to enforce the forfeiture by entry or the starting of ejectment or summary proceedings.⁶

If the lease provides that in case of forfeiture the landlord may relet the premises, the tenant agreeing to pay any deficiency in the rent over and above the amount received as a result of such reletting, the tenant is liable for the deficiency under the express terms of his contract.⁷ This is not rent, which necessarily ends with the tenancy, but an amount by way of indemnity against loss which the tenant binds himself by his contract to pay.⁸ In such case the

3. *Id.*

4. *Jones v. Carter*, 15 Mees. & W. 718; *Johnson v. Oppenheim*, 55 N. Y. 280; *Grommes v. St. Paul Trust Co.*, 147 Ill. 634; *Sutton v. Goodman*, 194 Mass. 389; *Isom v. Rex Crude Oil Co.*, 147 Cal. 659, and cases in following notes.

5. See Ch. XII, *post*.

6. See note 4, *supra*.

7. *Way v. Reed*, 88 Mass. 364; *McCready v. Lindenborn*, 172 N. Y. 400; *Harding v. Austin*, 93 App. Div. 564; *Lewis v. Stafford*, 24 Misc. (N. Y.) 717; *Grommes v. St. Paul Trust Co.*,

147 Ill. 634, and cases cited in notes following.

8. *McCready v. Lindenborn*, 172 N. Y. 400; *Edmands v. Rust & R. Drug Co.*, 191 Mass. 123; *Slater v. Von Chorus*, 120 App. Div. (N. Y.) 16.

In *Michaels v. Fishel*, 169 N. Y. 381, under a general clause in the lease providing that the landlord should relet, etc., in case of entry by him, the court construes the expression as applying only to entry in the common law sense, actual entries for breach of condition or the like and the recovery of possession by ejectment,

landlord must make an honest and reasonable attempt to relet the premises as a condition precedent to the tenant's liability, otherwise the tenant is not liable under this provision.⁹

Rent payable in advance, though for a period which has not elapsed when the forfeiture is enforced and the tenancy ended, must be paid by the tenant.¹⁰ In a case, for instance, where the rent is payable on the first of each month in advance, and the forfeiture is enforced on the second or any subsequent day of the month, the tenant would be compelled to pay the rent for that month in spite of the forfeiture. A different position has been taken in one state, the court holding that the tenant was relieved because of failure of consideration.¹¹ In the case of an estate for life or in fee upon condition there is no question but that forfeiture of the estate would not give the tenant upon condition the right to recover back part of the purchase price or a defense to an action to recover the balance of the purchase price which may not have been paid by him before the forfeiture.¹² It is clear in any case of an estate upon condition lost through forfeiture that there has been no fail-

excluding the recovery of possession by summary proceedings as not included within the provision of the lease. This was an extremely narrow, technical interpretation of the lease in question, depending on the peculiar language of that particular lease, and cannot be regarded as establishing a general rule. The general rule was held to apply in the following New York cases in which forfeiture was enforced by summary proceedings under the statute. *Slater v. Von Chorus*, 120 App. Div. 16; *Slater v. Bonfiglio*, 56 Misc. 385; *McNulty v. Duffy*, 59 N. Y. Supp. 592; *Manning v. Ferrier*, 27 Misc. 522.

9. *Int. Trust Co. v. Weeks*, 203 U.

S. 364; *McCready v. Lindenborn*, 172 N. Y. 400; *Edmands v. Rust & R. Drug Co.*, 191 Mass. 123.

10. *Ellis v. Rowbotham*, 1 Q. B. 740; *Manning v. Ferrier*, 27 Misc. (N. Y.) 522, and cases cited; *Bernstein v. Heinemann*, 23 Misc. 464.

11. *Sutton v. Goodman*, 194 Mass. 389; *Hall v. Middleby*, 197 Mass. 485 (case of eviction by landlord which raises a different question, the landlord being the wrongdoer, not the tenant).

In *Wreford v. Kenrick*, 107 Mich. 389, the same conclusion was reached though no reason therefore is stated.

12. See *Estates upon Condition*, Ch. XII, *post*.

ure of consideration. The loss of his estate is due to the tenant's own wrongful act or default in breaking the condition subject to which he held the property.

On the other hand, the landlord can recover no rental for the part of the rental period which has elapsed before the forfeiture, in a case where the rent is not payable in advance. In neither case will any apportionment be allowed.¹³

In case of breach of condition for nonpayment of rent or of taxes, the breach involving only the nonpayment of money,¹⁴ or breach of condition arising in other ways through accident, fraud or mistake where no harm has resulted to the landlord, and where the tenant stands ready to correct the error and to comply with the condition so far as it may be done after the breach, equity will relieve the tenant from the forfeiture, the court intervening on well settled principles of equity.¹⁵

Where the tenant has redeemed the tenancy from a forfeiture by subsequent payment of the rent or by action in equity, his rights against his subtenant are restored though the subtenant has attorned to the head landlord after the tenant's breach of condition. The effect of the redemption is to restore all parties to their original position.¹⁶

§ 190. Destruction of Leasehold Premises by Fire or Other Casualty.—As stated heretofore in discussing the nature of the relation of landlord and tenant¹ the destruction of buildings or other parts of the leasehold premises by fire or other action of the elements has no effect upon the tenancy or the tenant's obligation to pay rent, provided the tenant's estate extends to the land and is not confined to the building or part thereof which is destroyed.² The

13. *Hall v. Middleby*, 197 Mass. 485.

14. *Giles v. Austin*, 62 N. Y. 486.

15. *Mactier v. Osborn*, 146 Mass. 399. See Ch. XII, *post*.

16. *Wilson v. Jones*, 64 Ky. 173.

1. See § 142, *ante*, and notes 9 and 10, thereunder.

2. *Fowler v. Bott*, 6 Mass. 63; *Roberts v. Lynn Ice Co.*, 187 Mass. 402.

tenant is the owner of the premises for the term; the rent is the purchase price which he has agreed to pay in installments for the estate transferred to him by the lease; his interest like that of the landlord may be insured by him. Apart from statute there is no reason why a loss of this nature should not affect his interest and fall upon him just as it also affects the interest of a life tenant, or the interest of the landlord in reversion or remainder.

In New York and many other states, however, it has been found expedient to enact a statute changing the common law rule on this point. The New York statute,³ followed in several other states⁴ provides that where any building leased or occupied is destroyed, or so injured by the elements, *or any other cause* as to be untenable and unfit for occupancy, and no express agreement to the contrary has been made in writing, the lessee or occupant may, if the destruction or injury occurred without his fault or neglect, quit and surrender possession to the landlord, and he is not liable for rent for the time subsequent to the surrender. This statute recognizes the fact that rent is fixed between the parties and is paid on the basis of the value of the use and enjoyment of the premises from day to day to the tenant, whatever the technical aspects of the case may be, that the premises are essentially the landlord's in that he secures in rent the value of their use and enjoyment, and therefore in justice and fairness the loss should fall on him rather than on the tenant. The statute does not apply to a case where the untenable condition is caused by the tenant's failure to make repairs, and therefore a tenant is not justi-

(if license only had been created the licensee would have been relieved of obligation to make further payments); *Hurmston, etc. Co. v. Wheeler*, 175 Ill. 514; *Kingsbury v. Westfall*, 61 N. Y. 356 (case arising before enactment of statute); *Buss-*

man v. Ganster, 72 Pa. St. 285; *Womack v. McQuarrie*, 28 Ind. 103.

3. N. Y. Real Prop. L., § 227, originally enacted, ch. 345, Laws of 1860.

4. Wis. Acts 1903, ch. 306; Ohio Rev. St. 1906, § 4113; Minn. Rev. Laws, 1905, § 3331.

fied in surrendering the premises where a building becomes untenable through gradual wear and decay which ordinary repairs by the tenant would correct.⁵ The extent of the tenant's duty to make repairs, either in the absence of or under an express covenant to repair, has been heretofore discussed.⁶ The immediate purpose of the statute was undoubtedly to relieve the tenant from liability for rent on his electing to surrender in case of destruction of a building by some sudden casualty, such as fire or tempest, and statements limiting the application of the statute to such instances appear in several cases.⁷ It is clear, however, that the language of the statute includes any destruction, however caused, which renders the premises untenable during the term, provided the condition has not been caused by the act or default of the tenant.⁸ Therefore if the untenable condition has resulted from the gradual deterioration caused by action of the elements in spite of repairs

5. *Syndham v. Jackson*, 54 N. Y. 450; *Lockrow v. Horgan*, 58 N. Y. 635; *Markman v. David Stevenson Brew. Co.*, 104 App. Div. (N. Y.) 420; *Thomas v. Nelson*, 69 N. Y. 118; *Goldberg v. Lloyd*, 110 N. Y. Supp. 530; *Crawford v. Redding*, 8 Misc. (N. Y.) 306; *Gulliver v. Fowler*, 64 Conn. 556.

See, also, *May v. Giles*, 169 N. Y. 330, and *Street v. Central Brew. Co.*, 101 App. Div. (N. Y.) 3. The conclusion to be drawn from the cases is that the statute does not apply to a case where the failure to make repairs by the tenant in violation of his duty to his landlord was the cause of the untenable condition, but that the statute does apply where there has been no such failure, but the premises have nevertheless become untenable either through sudden action of the elements, as by fire,

flood or storm, or through gradual decay.

6. See §§ 164, 165, *ante*.

7. *Syndham v. Jackson*, 54 N. Y. 450; *Edwards v. McLean*, 122 N. Y. 302; *Lansing v. Thompson*, 8 App. Div. (N. Y.) 54; *Hilliard v. Gas Coal Co.*, 41 Oh. St. 662; *Hatch v. Stamper*, 42 Conn. 28 (under somewhat different statute, see above section, *post*).

8. If caused by the negligent or other wrongful act of the tenant the statute, by its own terms, has no application. *Johnson v. Oppenheim*, 55 N. Y. 280 (tenant refused to permit excavator to enter to shore up building under statute requiring such shoring, damage to building resulting); *Dorr v. Hotchkiss*, 49 N. J. L. 571 (negligence of tenant causing fire.)

made by the tenant, he having made all repairs required of him under his lease, the statute covers the case and the tenant may end the term by surrendering the premises.⁹ The statute, however, does not apply to defective conditions existing at the time the lease was made.¹⁰ As we have seen heretofore¹¹ the maxim "*caveat emptor*" applies, and in the absence of fraud on the landlord's part, or of an express covenant that the premises are tenantable or fit for the use intended, the tenant is liable for the rent reserved and cannot avoid such liability by surrendering the premises because they were untenable or unfit for occupancy when the lease was made. However expedient it might be to cover such case by a similar statutory provision, no such statute has been enacted, and the common law rule still prevails.

The statute under discussion does not apply where the premises are rendered untenable by the act of some third person in maintaining a nuisance on adjoining property. The tenant may protect himself by securing an injunction restraining the continuance of the nuisance, and therefore the premises are not rendered untenable within the meaning of the statute, as the tenant's failure to act in his own defense would be a contributing cause.¹² It is clear, however, that the statute covers cases where the untenable condition is caused by acts of strangers or neighbors not amounting to a nuisance, giving rise to conditions which the tenant cannot prevent by injunction. There can be no doubt, for instance, that the destruction, total or partial, by

9. See note (5) *supra*, also, Tallman v. Murphy, 120 N. Y. 345; Messerole v. Hoyt, 161 N. Y. 59; Vann v. Rouse, 94 N. Y. 401.

10. Edwards v. McLean, 122 N. Y. 302 (scarlet fever in family of former tenant, statute did not apply, though tenant could not enter); Messerole v. Hoyt, 161 N. Y. 59; Prabar

v. Tousey, 93 App. Div. (N. Y.) 507; Daly v. Wise, 132 N. Y. 306 (no discussion of statute in question.)

11. See § 166, *ante*.

12. Floyd-Jones v. Schaan, 109 N. Y. Supp. 362; Brick v. Favilla, 51 Misc. (N. Y.) 550. See also § 166 *ante*, and cases thereunder.

fire caused by the wilful or negligent act of a stranger would relieve the tenant from liability under the statute. So, also the grading of adjoining land in such way as to cause surface waters to flow upon the leased premises and into the cellar of the house occupied by the tenant, rendering it so damp as to make it unfit for occupancy, would be a case coming within the application of the statute, the grading not amounting to a nuisance.

It is clear, therefore, that the statute applies to any case where the premises are rendered unfit for occupancy from any cause arising during the tenancy and not due to the wrongful act or default of the tenant or to a nuisance maintained by a stranger on adjoining property. Thus where at the occurrence of heavy rains the cellar became flooded, and the premises were rendered damp and malarial,¹³ and where a damp and dangerous condition was caused by the flow of water and drainage from the land adjoining¹⁴ the court held that the statute applied, the jury having found as a fact that the premises had been rendered untenable and unfit for occupancy. The fact that the cellar walls and arrangements for drainage were the same as at the time the lease was made seems to have been regarded in these cases as immaterial, since the condition complained of actually arose as a result of additional causes occurring during the term. The question of whether the premises were in fact rendered untenable and unfit for occupancy is for the jury to determine, as a question of fact.¹⁵

By the terms of the Connecticut statute¹⁶ the tenant is relieved from rent so long as the premises are unfit for occupancy, and he may remain in possession during that time,

13. *Messerole v. Hoyt*, 161 N. Y. 59.

14. *Vann v. Rouse*, 94 N. Y. 401.

15. *Messerole v. Hoyt*, 161 N. Y.

59. See the other cases cited under this section most of which involve the same proposition. Where the in-

jury is slight, involving a small amount for repairs, the tenant will not be justified in surrendering the premises. *Wampler v. Weinmann*, 56 Minn. 1.

16. Gen. St. 1902 § 4045.

his liability for rent again arising as soon as the premises are made fit for occupancy.¹⁷ In New Jersey,¹⁸ in the absence of an agreement to the contrary, in case of injury by fire without the tenant's fault the landlord shall make repairs as speedily as possible, otherwise rent ceases until such repairs are made, while in case of total destruction of the buildings rent is payable only to the time of their destruction, the tenancy then ending. In several other states somewhat similar statutes have been enacted, modifying the common law rule.¹⁹ In states without such statutes the common law rule generally prevails, though in a few scattered cases it is held that the tenant may regard the tenancy as ended in case of destruction of the premises, though no statute so provides.²⁰

§ 191. Miscellaneous Questions Arising Under Statutes Relating to Destruction of Leased Premises.—If the lease “otherwise expressly provides” the statute in New York and most of the other states having similar statutes has no application, by the express provision of the statute itself. Either an express provision that the statute shall not apply, or a provision necessarily inconsistent with the application of the statute must appear in the lease in order to prevent its application. Thus a provision that in case of fire the landlord should repair immediately, and if he should decide to rebuild the tenancy would cease was held to exclude the statute.¹ So also a provision that the lease should terminate on a total destruction of the building;² where the

17. *Gulliver v. Fowler*, 64 Conn. 556; *Miller v. Benton*, 55 Conn. 529. A sudden act of the elements alone is contemplated by statute, *Hatch v. Stamper*, 42 Conn. 28.

18. 2 Gen. St. 1923; *Booraem v. Morris*, 74 N. J. L. 95.

19. See *Tiffany, Landlord & Ten.*, pp. 1211-1213.

20. *Wattles v. South Omaha Ice Co.*, 50 Neb. 25.

See also *dicta* in *Witaker v. Hawley*, 25 Kan. 674.

1. *Roman v. Taylor*, 93 App. Div. (N. Y.) 449.

2. *Tocci v. Powell*, 9 App. Div. 283.

parties made express stipulations covering rebuilding and insurance in case of fire;³ where it was agreed there should be no reduction in rent during repairs except when necessitated by fire, rent to be suspended until the damage was repaired only in case the premises became wholly untenable,⁴ it was held that the parties having expressly provided for the contingency covered by the statute, they necessarily excluded the statute by express agreement. Where, however, the situation provided for by express agreement did not arise, so that the agreement of the parties had no application, the statute was held to apply if the premises had become untenable and the other requirements of the statute were present.⁵

The agreement of the parties governs in any case in which they have expressly provided for the contingency of destruction or damage to the premises by fire or otherwise.⁶ If by such agreement rent is to be suspended merely while repairs are being made or buildings rebuilt it will be revived when the repairs or rebuilding are completed.⁷ Where the landlord has covenanted to repair or rebuild in such case and fails to do so within a reasonable time, or within the time provided by the lease, the tenant may quit the premises, treating the term as ended, and rent is extinguished.⁸

3. *Lehmeyer v. Moses*, 69 App. Div. 531.

4. *Butler v. Kidder*, 87 N. Y. 98.

5. *N. Y. Real Est. Co. v. Motley*, 143 N. Y. 156, in which case the lease provided that in case of injury by fire the lessee should pay rent for only such part as he could occupy during the time required for repair, and in case rebuilding was required the tenancy should end, and it appearing that the premises were made wholly untenable, but did not require rebuilding, the court held that the statute applied.

6. *Wood v. Hubbell*, 10 N. Y. 479; *Cary v. Whiting* 118 Mass. 363; *N. Y. Real Est. Co. v. Motley*, 3 Misc. (N. Y.) 232.

7. *Rogers v. Snow*, 118 Mass. 118; *Smith v. McLean*, 123 Ill. 210; *Einstein v. Levy*, 25 App. Div. (N. Y.) 565.

8. *Nimmo v. Harvey*, 23 Misc. (N. Y.) 126; *Bacon v. Albany etc. Co.*, 22 Misc. 592.

The tenant may use part of the premises for storage or the like while the damages are being repaired by the landlord under such a stipulation,

The tenant must surrender possession within a reasonable time after the premises become untenable to be relieved from his obligation to pay rent under the statute. What is a reasonable time will depend upon the facts of each case. He is given a sufficient time to remove his personal property from the premises, and to adjust insurance claims in case of damage to such property by fire.⁹ If he actually give up possession notice thereof to the landlord is not necessary.¹⁰

Rent payable in advance which has actually become due before destruction of a building on the premises takes place must be paid by the tenant, the statute in no way freeing him from his liability already accrued, though the destruction take place early in the period for which the rent is so payable.¹¹

§ 191-a. Destruction of Building When Tenant Has no Interest in Land.— When the lease gives the tenant an interest in an apartment, store, loft, or other part of a building, no interest being given to the tenant in the land on which the building stands except to have the building supported thereby, the destruction of the building brings the tenancy to an end since the subject matter of the lease is completely destroyed, and all obligation to pay rent thereafter accruing immediately comes to an end.¹ As the tenant's interest is limited to the building, or part

without subjecting himself to liability for rent during that time, the premises being in fact untenable. *Kip v. Merwin*, 52 N. Y. 542; *Smith v. McLean*, 123 Ill. 210.

9. *Smith v. Kerr*, 108 N. Y. 31; *Fleischman v. Topfritz*, 134 N. Y. 349; *Johnson v. Oppenheim*, 55 N. Y. 280; *Roach v. Peterson*, 47 Minn. 291.

10. *Fleischman v. Topfritz*, 134 N. Y. 349.

11. *Craig v. Butler*, 156 N. Y. 672; *Werner v. Padula*, 167 N. Y. 611.

1. *Graves v. Berdan*, 26 N. Y. 498; *Stockwell v. Hunter*, 52 Mass. 448; *Shawmut Nat. Bank v. Boston*, 118 Mass. 125; *Womack v. McQuarrie*, 28 Ind. 103. (In case of destruction, lease extending to the entire premises, the common law rule prevails in Indiana in the absence of express provision in the lease); *Humiston, K. & Co. v. Wheeler*, 175 Ill. 514.

thereof leased to him, he has no right to make use of the land to build upon it or for any other purpose. The thing out of which rent issues being entirely destroyed, rent necessarily ends with it. On the same principle if lands covered by a lease are taken by action of the sea or other public navigable waters, so that it becomes public lands belonging to the state as land under public waters, rent is extinguished entirely or pro rata as the case may be, the tenant being completely deprived of the whole or part of the thing leased. But if the waters in question are not the sea or public navigable waters, rent is not affected, since the tenant remains exclusively the owner thereof, though it may be of less value to him than before.²

2. 1 Rolle Abr. 236; *Graves v. Berdan*, 26 N. Y. 498 (dicta).

CHAPTER VIII.

EQUITABLE ESTATES; USES AND TRUSTS.

A.—Uses Before the Statute of Uses.

§ 192. **Nature and Origin of Equitable Estates.**—An equitable estate, as has sufficiently appeared in connection with the discussion of the foregoing topics in this work, involves in every case the holding of the legal title to the land by a trustee who has no beneficial interest of his own, but who holds solely for the benefit of the beneficial or equitable owner, called the *cestui que trust*. The real ownership, involving every right to the possession and enjoyment of the land, subject only to the restrictions of the trust, is in this beneficial owner. The origin of equitable estates goes back to the ancient custom of owners transferring their lands to friends upon whom they could rely, with directions to hold and use the land for the benefit of the owner or his family, or to convey to others, where the result sought could not be accomplished under the forms and rules of law then prevailing.¹ In many cases the purpose of transferring the legal title to a third party, retaining the beneficial interest in the transferor, was undoubtedly to avoid incidents and burdens attaching to legal ownership. This third party was alone recognized as the owner of the land by courts of law, and if he was a man who could be relied upon to follow the transferor's instructions, the transferor would retain the benefits of ownership without its burdens. Thus men transferred their land in this way in order to put it beyond the reach of their creditors, or to delay actions brought to recover the lands involved, as they do to-day.² This device

1. Williams R. P. (17th Int. ed.), 199; article by Mr. Justice Holmes, Law Quarterly Review, Vol. I, p. 162; 2. Digby Hist. L. of Real Property (5th ed.), 318; Williams R. P. (17th ed.), 199.

4 Kent Comm. 290, *et seq.*

was used also for a short time to avoid the statute of mortmain, title being taken in the names of individuals for the use of ecclesiastical corporations. Such conveyances in fraud of creditors were declared void by the statute, 50 Edw. III, c. 6, and conveyances so made to avoid the statute of mortmain were restrained by the statute 15 Rich II, c. 5.³ During the civil wars in England those engaged in treasonable enterprises frequently conveyed their lands to others not so involved to be held to their use, so as to escape forfeiture of their lands for treason.⁴ It is probable, however, that uses originated and developed to a considerable extent to accomplish purposes which were legitimate and laudable. Before the development of equity jurisdiction, and therefore before uses could be enforced by any proceeding at law or equity, it is probable that they were employed to accomplish many of the purposes for which trusts are employed to-day, as well as to obtain results impossible under the rules of law then existing.

Under the technical rules of law which grew out of feudalism, real property could not be disposed of by will nor could future estates be created in land except by way of remainder, greatly hampering owners in the disposition of their property. How uses were employed to overcome these difficulties will be discussed hereafter.⁵ As we will see in the following section, while the employment of uses for these purposes was developing as a matter of custom, there was growing up at the same time the jurisdiction of chancery, through which the rights of the beneficiary, or *cestui*

3. Digby, id. 319.

4. This device of putting land in the possession of a trustee who alone was recognized as owner at law, all benefits of ownership being retained by the transferor, was also used to avoid the burdens of feudal tenure, the incidents of relief, wardship and marriage to which the overlord was entitled, and to avoid dower. The

beneficial interest, or use, was not subject to the incidents of feudal tenure or to dower, and creditors could not reach these interests to satisfy their claims, equity refusing to follow the law in applying these incidents to uses. See Williams R. Property (17th ed.), 200.

5. See § 194, note 18, *post*.

que use, came to be recognized and enforced against the trustee to uses. The ways in which uses were employed to accomplish these various purposes may best be explained and understood in connection with a consideration of the ways in which chancery recognized and enforced the rights of beneficiaries of uses, as detailed in the following sections.

§ 193. Nature and Origin of Equitable Estates; Uses.—

This transfer of the land to a third party to be held or conveyed by him in accordance with the wishes of the transferor resulted in making the third party absolute owner of the land at law. There was no way by which he could be compelled, by law, to carry out the wishes of the transferor. There was, however, a moral obligation to hold, use and convey the land in accordance with the uses for which it was transferred to him. At first there was no way to compel him to carry out the transferor's wishes except by appeal to his conscience, and by the influences of religion. There was no legal obligation at all, merely a moral one.¹ At the time these practices of conveying lands to friends in confidence to be held to uses were developing in England the jurisdiction of the Chancellor or the jurisdiction of Equity, was beginning to take form. The understanding of equitable estates necessarily involves some knowledge of the origin and nature of equity jurisdiction.

Under the early system of English law the king was regarded as the source of all justice within the realm and the common law courts derived their authority from him. As to all matters not falling within the powers of the courts as delegated to them by the king, and particularly in cases where no sufficient remedy existed in the courts, petitions were made directly to the king, or to his council, for the redress of wrongs and the granting of relief where justice required it.² During the reign of Edward I the king usually

1. Digby Hist. L. Real Prop. (5th ed.). 320. 321.

2. Digby, *id.* 321, 322; Williams Real Prop. (17th ed.), 194.

referred such petitions made directly to himself to the Chancellor. During the twenty-second year of the reign of Edward III an ordinance was made directing that petitions relating to matters of special grace should be referred to the Chancellor or to the keeper of the Privy Seal.³ Thereafter petitions were made directly to the Chancellor who by virtue of the power delegated to him by the king heard the parties and granted or withheld relief as justice required. The court of chancery, or of equity, thus formed, gave relief in all cases where the law courts gave no remedy or where the remedy at law was inadequate. The principles under which equity would give relief gradually became as clearly settled and defined, by precedent, as the rules of the common law. In this way two systems of law developed, the one supplementing the other.⁴

Upon the presentation of a petition the Chancellor would order a writ to issue commanding the party complained against to appear and answer and submit himself to the order of the court. The writ issued in the name of the king and was called a writ of subpoena. If the defendant refused or failed to obey the chancellor's decree his obedience was compelled by his arrest and imprisonment for contempt of court. The jurisdiction of equity is over the person, and its decrees are enforced by compelling the defendant to do the things ordered by the court, or to refrain from doing those things which the court may have enjoined him from doing.⁵

As we have seen, the law gave no relief against a feoffee to uses, or trustee, in case he refused to carry out the terms of the use for which the land was conveyed to him. The practice of conveying lands to uses had grown into a custom widely used and recognized. Justice required that the obligation in conscience imposed on the trustee should be en-

3. Digby, *id.* 322; Williams, *id.*, 194.

4. Digby, *id.* 322-324; Williams, *id.*, 194-197.

5. See preceding note.

forced. The court of chancery had the power and the machinery to accomplish this. Petitions were presented to the chancellor complaining of a breach of trust on the part of a trustee to uses, a writ of subpoena would thereupon issue, and the trustee would be compelled to appear and answer, and to obey the decree of the court ordering him to carry out the terms of the use, such obedience being enforced, if necessary, by imprisonment for contempt of court.

The earliest recorded petition of this kind was made during the reign of Richard II, but the Chancellor's court seems to have been little used for this purpose until during the reigns of Henry VI and Edward IV, when petitions against trustees to uses became more usual, and the rules under which Chancery gave relief became somewhat systematized. Chancery would restrain the trustee to uses from conveying or encumbering the land so held by him, from wasting or destroying it, and from doing any other act in violation of his trust. It would also compel him to hold the land for the benefit of the *cestui que use*, or beneficiary, permit him to occupy the land and to take the rents and profits, convey it to him at his direction, or to his heir, or to a person named in his will, or to a third party to whom the beneficiary may have sold his interest. At first this obligation was a purely personal one between the trustee and the beneficiary, binding only on the trustee, but not binding on his heir or on a purchaser for a valuable consideration with notice of the use. Later, however, and by the reign of Edw. IV, courts of chancery held that the heir of the trustee took title subject to the same trust, as also did a purchaser with notice. Thereafter the interest of the *cestui que use*, or beneficiary, became something more than a right against the trustee to uses personally; it became an estate in the land itself, giving to him all beneficial rights of possession, enjoyment and disposition, subject only to the restrictions of the terms of the use. His interest became an estate enforceable; generally speaking, against the trustee or any person taking

title from the trustee not a purchaser for value without notice of the use. His interest, however, did not exist outside of the chancery court. At law the trustee, as holder of the legal title, was owner of the land, alone recognized as such, the beneficiary not being recognized as having any interest whatever. Since the estate of the beneficiary was a mere equity, it followed that it could not be enforced against a purchaser for value from the trustee without notice of the use; the rule having been early established in equity that the legal title to property will not be disturbed by a court of equity in any case where it has been conveyed to a purchaser for value who has taken title and paid such value without notice of the prior equity, which is thus cut off.⁶

In this way the practice of conveying lands to a friend on trust for various purposes, acquiring the force of a general custom, developed finally into a great system of estates, recognized and enforced in equity. This system developed out of the customs, and therefore out of the needs of the people. Though attempts have been made to connect them with certain alleged analogous doctrines and institutions of the Roman law, the analogy in each case is slight, or fails altogether, and there is nothing but conjecture on which to base the conclusion that these doctrines had any influence whatever upon the development of equitable estates as part of the English law.⁷

§ 194. Creation and Incidents of Uses Before the Statute of Uses.— We have seen that uses as equitable estates, developing from customary transfers made in trust and confidence for stated purposes, grew for the most part out of

6. For one of the best accounts of the assumption of jurisdiction over uses by the Chancellor, see Digby Hist. L. Real Prop. (5th ed.), pp. 324-327. See, also, Williams Real Prop.

(17th ed.), 201-203. For examples of early cases in Chancery involving the enforcement of uses, see Digby, id., pp. 334-343

7. Digby, id. 316-318.

actual need for such estates, 1st, to fulfill the purposes for which trusts are employed today, that property might be held by those who were able and trustworthy for the use of beneficiaries who might be unable or unfit to manage the property themselves, and 2nd, to provide for the legitimate and laudable disposition of property in ways which were made impossible by the technical and unreasonable rules that feudalism had fixed upon the common law; that to a less degree they were used for unlawful purposes in order to escape obligations and burdens attaching to ownership of land. As a result of the combined causes or occasions for these interests, the greater part of the land of England came to be held subject to uses, and this situation existed for a considerable time before the enactment of the Statute of Uses hereafter discussed.¹

Uses were created either (a) by transmutation of possession, viz.: by conveyance to a third party as trustee to uses, either by feoffment with livery of seisin, fine or recovery, or by lease and release,² and (b) without transmutation of possession, the owner retaining title and seisin in himself, but holding for the use of the beneficiary. In case of a conveyance without the recital of a consideration, there being no relationship of blood between the grantor and grantee, the chancellor's court would presume an intention on the part of the grantor that the grantee should hold, not for his own benefit, but for the use of the grantor, because of the apparent lack of motive to convey outright. The mere recital of money consideration was sufficient, however, to prevent this result, though no consideration was actually paid, since the motive of the grantor to convey the estate outright would then be sufficiently expressed.³ The two methods of creating a use without transmutation of possession, were by bargain and sale, and by conveyance

1. See 2 Bl. Com. 137.

Eagle Fire Co. of N. Y., 9 Wend. (N.

2. Digby, id. 328, 329; Rogers v. Y.) 611.

3. Id.

to stand seized. A *bargain and sale* arose in any case where the owner made a bargain to sell his land to another, who paid or agreed to pay as a consideration therefore, something of value. Equity regarded the vendor as at once holding the legal title for the benefit of the bargainee, who at once became the equitable owner of the land.⁴ A *covenant to stand seised* was a covenant on the part of the owner to stand seized for the benefit of the beneficiary named; if the beneficiary was a blood relative of the covenantor equity would enforce the covenant because of the consideration of blood, and the covenantor would hold as trustee to the use of the beneficiary. If there was a money consideration, or a consideration of value, the covenant was effective as a bargain and sale. If no consideration at all either of blood or value existed, the covenant was void.⁵

The interest or estate of the *cestui que use* or beneficiary could be transferred freely and without formality of any kind, no deed or writing being required, and he could dispose of his interest by will. This follows from the fact that the trustee to uses was bound to obey the directions of the beneficiary in all respects. The beneficiary was entitled to the possession of the land, though at law his possession was regarded as that of a tenant at will only, holding from the trustee as legal owner.⁶

By means of uses enforceable in equity, estates impossible at law could be freely created. At law a future estate could be created only as a remainder limited after a precedent estate for life or for years. A future estate to arise on the death of the transferor, or on the happening of a subsequent event, was void unless a life estate or an estate for years was created at the same time, which would fill the gap intervening until the taking effect of the future estate. The reason for this was the feudal rule that the seisin could

4. Digby, id. 330; *Rogers v. Eagle Fire Co. of N. Y.*, 9 Wend. 611.

6. Digby, id. 328; Williams R. P. (17th ed.), 203.

5. Id.

never be in abeyance. Since the person seised was the feudal tenant answerable for all feudal dues and services incident to his tenure, and since it was essential to feudalism that some person be at all times seised, it followed that any future estate which would result in leaving seisin in abeyance was void in its creation. A conveyance to take effect at a future day put seisin in abeyance, because the feoffor parted with his seisin in making livery of seisin or its equivalent, which was required for the conveyance of any present freehold estate. By the terms of the feoffment the feoffee would not become seised until the taking effect of his future estate. During the interval therefore, no one would be seised.⁷ Such an estate, however, would be recognized and enforced in equity if created by way of use. Thus an estate to arise on the death of the transferor, or on his marriage, or on the marriage of the beneficiary, or on the happening of any future event, could be created by conveying to a third person to hold as trustee to uses for the beneficiary on the happening of the contingency, in the meantime holding for the benefit of the transferor. Since seisin would be in the trustee throughout it would never be in abeyance and the common law rule would not be violated. The same result would be accomplished by a covenant to stand seised, or by a bargain and sale for the benefit of the beneficiary on the happening of the future event, seisin remaining in the transferor until the happening of the event, on which he would be compelled by a court of equity to transfer to the beneficiary provided there was consideration of value or of blood to support the covenant or bargain.⁸

A second illustration of a future estate void at law but good when created as a use in equity, was a future estate limited to take effect a day or a year or any other period after the ending of a prior life estate. Thus where land was conveyed to A for life, and one year after A's death to

7. See Ch. XIII, *post*, on subject of remainders.

8. Digby, *id.* 332, 333; *Rogers v. Eagle Fire Co.* of N. Y., 9 Wend. 611.

B in fee, the estate given to B was void, since it would put the seisin in abeyance during the year following A's death.⁹ But by conveying to X as trustee to the use of A for life, and one year after A's death to the use of B in fee, a valid equitable estate in favor of B was created, since the seisin remained in X as holder of the legal title, there being no abeyance thereof during the year following A's death, and the moral obligation on X's part to hold for B a year after A's death was in all respects the same as his obligation to hold for A during A's life, and would be enforced by equity accordingly.¹⁰

In exactly the same way and for the same reasons a future contingent interest limited to take effect after an estate for years would be valid in equity when created by way of use. Such contingent remainder was void at law, no one being seised, since the tenant for years could not be seised, having only a chattel interest, and the contingent remainderman could not be seised, having only a possible interest; therefore such a remainder so limited would cause a suspension of the seisin until the happening of the contingency on which the remainder depended.¹¹ When created by way of use the seisin of the trustee continuing throughout, and his moral obligation also continuing in favor of the remainderman, the interest created was perfectly valid in equity.¹²

At common law a fee limited after a fee was void, the second fee not being a remainder, the first fee embracing the entire estate.¹³ But in equity where land was conveyed, for instance, to A as trustee for the use of X in fee, but if X should die without issue surviving him then for the use of Y in fee, there was no reason why the moral obligation imposed upon A to hold for X should not also bind him to hold for Y on X's death without issue, the purely

9. See Ch. XIII, *post*.

10. See note 8, *supra*.

11. See Ch. XIII, *post*.

12. See note 8, *supra*.

13. See Ch. XIII, *post*.

technical common law rule having no application to the trustee's moral duty. Therefore equity would compel him to hold, first for A, and after A's death without issue, or on the happening of any other condition provided for by the original owner, for the benefit of B in fee.¹⁴ In the same way, and for the same reasons an estate in fee could be created by way of use to arise on the happening of a contingency which would operate to abridge or terminate a precedent estate for life. Such an estate was void at law because not created by way of remainder, it being a future contingent interest in no sense the remainder of the fee over and above the particular estate.¹⁵

So also equity would compel the trustee to carry out the uses provided for in the transferor's will, when the land had been conveyed to him subject to such uses as might be named in such will,¹⁶ and to hold for the sole and separate use of the transferor's wife, or to convey to the transferor and his wife jointly, where the land had been conveyed to the trustee for that purpose.¹⁷

14. See note 8. *supra*.

15. See Ch. XIII, *post*.

16. There seems to be no doubt that wills of land as well as of personal property were valid during the Saxon period. But with the establishment of feudalism following the Norman conquest wills of real property became invalid, since it was regarded as inconsistent with the feudal system that the vassal be permitted to interfere with the inheritance of the estate by his heir by means of a devise to a stranger. Therefore from the time feudalism had become established until the Statute of Wills, enacted shortly after the enactment of the Statute of Uses, wills of real property were void, though wills of personal property were valid. But

by conveying to a trustee to hold the property subject to such uses as might be provided in the transferor's will, owners of land could in equity effectually dispose of it by will, the Chancellor compelling the trustee to distribute the property in accordance with the provisions of the will. Digby Hist. L. Real Prop. (5th ed.), 330, 331.

17. Digby, *id.*, 331. Here, also, the Chancellor refused to be bound by the technical common law rule that a married woman could not hold separate property, and compelled the trustee to hold the property for her benefit in accordance with the terms of the use under which it was conveyed to him.

In the main, equity followed the law in applying to this new class of estates rules governing their duration and devolution to heirs in case of intestacy. Equity did not follow the law by applying technical rules which had become engrafted on the common law through feudalism, to escape from which uses were frequently employed. Therefore the sharp differences brought out in the various illustrations given above arose from the fact that the application of these rules would largely defeat the purposes for which uses were employed, and would in each case interfere with the administering of justice and equity in their enforcement. An estate in equity was either for years, for life, in fee simple or in fee tail, depending on the same rules governing estates at law. So also in case the owner died intestate his equitable estate descended to his heir subject to the rules governing legal estates.¹⁸ But the wife or husband of the beneficiary was not entitled to dower or curtesy in the equitable estate; the right of escheat on failure of heirs did not exist in favor of the overlord, and the creditor of the beneficiary could not take the lands on execution.¹⁹

B.—The Statute of Uses and Its Effect.

§ 195. **Nature and Purpose of the Statute.**—As we have seen, most of the land of England had, for reasons detailed in the preceding sections, become subject to uses, so that it was subject to two sets of owners, one at law, another in equity, causing great confusion and much injustice, since creditors were deprived of their right to enforce their claims against the property of their debtors, the overlord was deprived of his right of escheat, wives were deprived of dower, and the king of his right of forfeiture. The Statute of Uses, enacted during the 27th year of the reign of Henry VIII, had for its object the wiping out of equitable estates in all cases where no active duty was imposed upon the trustee,

18. Digby, *id.* 327, 328.

19. *Id.*

by declaring that the legal and beneficial ownership should be united in the owner of the use. The statute provided that thereafter all uses then existing should be changed into legal estates, and that on the creation of any use thereafter the legal title as well as the beneficial interest should vest immediately in the beneficial owner, or *cestui que use*, the trustee to uses taking nothing. Therefore on the enactment of the statute, all existing uses were changed into legal estates of the same duration and extent, and all uses thereafter created were operated upon by the statute and changed at the moment of their creation into legal estates corresponding in all respects as to duration, extent, conditions and limitations with the equitable estate which would otherwise have arisen.¹

§ 196. Effect of the Statute of Uses; Trusts.—It was probably never the purpose of Parliament to do away with equitable estates altogether, but only to destroy bare or naked uses, where no active duty was imposed on the trustee, and where he was to act as a mere conduit or repository of the legal title. In any event the courts construed the statute as not applying to trusts where an active duty was imposed on the trustee, to manage and care for the property and turn over the income to the beneficiary, to sell or mortgage the property for stated purposes, or the like. In these cases there was a good reason in each case for the existence of the trust, and the courts held that the statute in no way affected them, they continuing as equitable estates, thereafter being called trusts.²

The courts also held that the statute did not apply to a use for a term of years where the land was given to a trustee for a term of years only to hold for stated uses. The statute related only to freehold estates to uses. Therefore uses for a term of years were unaffected by the statute

1. St. 27 Henry VIII, c. 10; Digby, id. 344-347.

2. Digby, id. 369, 370; 2 Bl. Com. 336.

and survived as trusts. It should be noted, however, that this does not apply to a transfer in fee or for life to a trustee to hold to the use, for instance, of A for ten years, and then for the use of B for life, remainder for the use of C in fee. In such case the statute operated, changing the term of years as well as the life estate and the remainder into legal estates in A, B and C respectively. The case referred to is illustrated by a devise of land to X as trustee for twenty years to hold to the use of A. Since X as trustee took only a term of years, and since the statute referred only to freehold estates transferred to a trustee to uses, it followed that it in no way affected a term of years so transferred to a trustee. Therefore interests of this kind continued to exist as equitable estates, called trusts after the statute.³

Finally, the courts decided that where land was conveyed to A, to the use of B, to the use of C, the statute operated on the first use in favor of B changing it into a legal estate in B, who, however, held subject to the use in favor of C unaffected by the statute. There seems to have been no reason for this holding capable of intelligible expression to-day. The result, however, was to leave unaffected by the statute the second use in every case of a use upon a use, which survived in each case as an estate in equity, called, as in the other cases unaffected by the statute, a trust. Therefore after the statute all that was required to create an equitable estate in every way similar to uses before the statute, was to introduce a third person as the first trustee, the deed or will providing that he should hold to the use of the person intended to be the real trustee, who in turn should hold for the person designed as the real beneficiary. Thus if it was desired to convey, or devise land to A in trust for B, though no active duty of any sort was to be imposed on the trustee, who was to be a mere repository of the legal title, the very situation sought to be prevented

3. Digby, *id.* 370; 4 Kent Com. 290-312, II Trusts; 2 Bl. Com. 336.

by the statute, all that was necessary was to convey or devise to X to the use of A to the use of B. X would take nothing since the statute operating on the use in A would at once change it into a legal estate. But since the statute could not operate on the second use, as the courts viewed the matter, A held the legal title in trust for B, the so-called trust estate being in every respect the same as a use before the statute. After this doctrine had become established, therefore, the statute no longer had any substantial effect in preventing the creation of mere dry or naked equitable estates, involving the mere holding of the legal title by the trustee, without any active duty on his part. Thus it failed completely to accomplish its chief purpose.⁴

In this way the modern law of trusts originated. As we have seen trusts are made up of uses in which an active duty was imposed upon the trustee, sometimes referred to as trusts before the Statute of Uses, for a term of years only as above explained, and of mere passive uses created in the form of a use upon a use. These trusts are equitable estates of exactly the same nature as uses before the statute, except that by means of statutes and decisions the principal grounds for objection to them which gave rise to the Statute of Uses have been removed. Broadly speaking, the incidents attaching to legal estates apply to trusts, the rule being general that equity follows the law in applying legal incidents to equitable estates. Estates for life, in tail and in fee simple, future estates in remainder and future execu-

4. This doctrine was established by *Tyrrell's Case*, *Dyer's Reps.*, 155a, printed in *Digby*, id. 375. See, also, preceding note. The courts held that a use upon a use was void, the statute having operated once on the first use, converting it into a legal estate, was exhausted, and could not again operate on the second use, this arising out of some mysterious and unintelligible quality in the use itself, in no

way based on the intention of the parties or on any rational rule of ownership. Since the second use was left by the courts of law as an obligation in conscience only, unaffected by the statute, a situation was presented which required the affirmative action of the Chancellor, exactly as in the case of uses created before the statute.

tory interests may be created as trusts subject to the same rules that govern legal estates. They may be taken to pay the debts of the owner, and are subject to the incidents of escheat, curtesy, and more recently by statute in England and by statute and decision in the United States to dower.⁵

Though the Statute of Uses failed to accomplish its main purpose, as recited in its preamble, it had an effect upon the law of conveyancing that was revolutionary. We have seen that before the statute a future executory estate to spring up in the grantee on a future day, or on the happening of a contingency in the future, could be created as a use in equity, and that a fee upon a fee, or a fee limited after a life estate on a contingency in derogation or destruction of the prior life estate could also be created in equity as a shifting use.⁶ The statute did not prevent or limit in any way the creating of uses. It merely provided that such uses, at the moment of their creation, should be changed into legal estates. Thus after the statute, an estate to arise on the death of the transferor, or on the marriage of the transferee, or on the happening of any future event, could be created as a use either by a conveyance to a trustee to uses for the beneficiary on the happening of the contingency, or by a covenant to stand seised or a bargain and sale by virtue of which the covenantor or bargainor would hold the legal title as trustee to uses for the beneficiary on the happening of the contingency provided for. The statute, operating instantly and automatically on the use,

5. Digby, *id.* 372, 373; see § 99, *ante*. As pointed out by Mr. Digby, p. 373, note, the doctrine that seisin could never be put in abeyance by an executory future interest without a precedent estate to support it, or by a contingent remainder limited after a term of years, has no application to a trust estate because the trustee is

seised at all times, satisfying the legal requirement, and therefore remainders or future executory estates in trust are valid though void at law. Under the modern statutes this difference is also removed, since such estates may now be created at law as well as in equity. See Ch. XIII, *post*.

6. See § 194, notes 7-11 *inc.*, *ante*.

would convert it into a legal estate, making the beneficiary of the use the owner of a legal estate in the land, of exactly the same duration and with the same qualities generally as the equitable estate or use would have had before the statute. In this way the beneficiary of the use would become immediately the owner of a future contingent estate at law, not created as a remainder, not dependent on the termination of a precedent estate, which would spring up in him in actual possession and enjoyment on the happening of the future contingency provided for. After the Statute of Uses, the legal estate thus created was called a *springing use*.⁷ Such an estate was void at common law before the statute, since it would put seisin in abeyance as heretofore explained.⁸

A *fee upon a fee*, or a fee limited after a life estate in derogation thereof, void at law, but valid by way of use in equity as explained heretofore, could be created under the Statute of Uses in exactly the same way as a *shifting use*. Thus if land is conveyed to a trustee to uses for the benefit of A and his heirs, but if A should die without issue surviving then for the benefit of B and his heirs, the estate created in B would be a valid future executory estate at law, the use in his favor being executed and changed immediately into a legal estate by operation of the statute.⁹

Uses created as remainders as in the case of a use created as a contingent remainder limited after a term of years are subject to rules differing radically from those applying to shifting and springing uses. As we have seen, a contingent use limited after a term of years was good in equity before the statute for the same reasons that rendered springing uses valid, seisin not being in abeyance since the trustee to uses was seised during the interval until the happening

7. Digby, id. 359, 360; 4 Kent Com. 290-312.

8. See § 194, *ante*; see preceding note.

9. See § 194, *ante*.

of the contingency on which the remainder would become vested.¹⁰ There is no reason why the statute should not operate here as in the other cases so as to convert the use into a legal estate, thus permitting the creating of a contingent remainder on a term of years at law as well as in equity. It was settled, however, in a line of cases, that if the future estate was created in the form of a remainder by deed under the Statute of Uses it must stand or fall as such, and therefore if limited after a term of years it was void because such a remainder was void at common law, the courts entirely losing sight of the fact that such remainder was valid as a use in equity before the statute, and should therefore be regarded as a valid legal estate by virtue of the operation of the statute.¹¹ Under the modern statutes permitting the creation of a contingent remainder after a term of years at law, this distinction is no longer of any importance.¹²

Thus we see that by virtue of the Statute of Uses it became possible to create by deed as well as by will, at law as well as in equity, the different future executory estates which were void under the common law, the common law permitting the creating of future estates only by way of remainder to take effect on the expiration of prior estates for life or for years. Furthermore the old cumbersome methods of conveying land by feoffment with livery of seisin, or by fine or common recovery were displaced by this new and simple method, the deed of bargain and sale under the statute operating to convey the title and seisin without entry by the grantee, since title and seisin were automatically transferred by operation of the statute from the grantor to the grantee. Deeds of bargain and sale were generally used in creating and transferring estates under the statute, the recital of the bargain and sale, supported by a consideration of value, recited in the deed, operating to

10. See § 154. *ante*.

12. See Ch. XIII, *post*.

11. Digby, *id.* 361, 362.

create a use in the bargainee, the bargainor holding the legal title for his benefit, and the statute immediately operating upon this use so as to convert it into a legal estate, the result being that the legal title held by the bargainor to the use of the bargainee for a moment, passed by operation of the statute to the bargainee or grantee. This deed involved no transmutation of possession to a third person as trustee to uses, and was the most convenient form of conveyance under the statute.¹³ Deeds of lease and release were also used, as explained in a subsequent chapter on Deeds and Conveyances.

C.—Trusts.

§ 197. Equitable Estates After the Statute of Uses.—In the preceding section we have seen how the statute failed in its purpose to do away with estates in equity by changing equitable estates into estates at law in the person named as beneficiary. By means of a use upon a use, after Tyrell's case, an estate in equity could be created in any case and for any purpose where a use could have been employed before the statute. The term "trust" was employed after the statute to designate all equitable estates thereafter created while the term "use" was limited to estates at law created by the statute through the changing of uses into legal estates.¹

The statute, however, did have one important effect on equitable estates—it caused courts of equity to apply to these interests nearly all the incidents attaching to estates at law, in this way removing the chief objections to estates in equity, rendering further legislation in destruction of these interests unnecessary. The doctrine that "equity follows the law" in applying to trusts the incidents of legal estates became well established. Thus trusts might be

13. See Ch. XIII, *post*, for a fuller treatment of the creation of future estates by way of shifting and springing use, and Ch. XXI, *post*, on con-

veyances under the Statute of Uses.

1. See section preceding and authorities cited.

created for a term of years, for life, in tail, or in fee, subject to the rules governing the creation of similar legal estates, except that the technical rule of the common law requiring the use of the word "heirs" in deeds creating estates in fee was not followed, courts of equity construing the instrument in accordance with the expressed intent of the creator of the trust, whether the technical word "heirs" was used or not. Trust estates, like estates at law, could be sold to pay the debts of their owners, through the proper proceeding in equity. They were also subject to the same laws of inheritance.² The incident of curtesy attached to trusts of inheritance, as to legal estates, except where it was excluded by the express terms of the trust.³ Equity refused, however, to recognize dower as an incident of trust estates, this being the one conspicuous exception to the general rule that equity follows the law as above stated. By modern statutes and decisions, however, this has been corrected, so that the right of dower now exists in trust estates of inheritance provided the husband die the owner thereof, dower not attaching as an inchoate right during the husband's life.⁴ The right of escheat was also recognized as applying to trusts.⁵

The purely technical rules governing the creation of future estates at law before the statute, discussed in the sections on uses immediately preceding, had no application to trusts, because seisin was never in abeyance through the creation of future estates as trusts unsupported by precedent particular estates, since the seisin was always in the trustee in whom the legal title was vested. For this reason a contingent remainder in trust limited after a term of years was good, though bad at law, even under the Statute

2. Williams Real Prop. (17th ed.), 213, 214; Digby Hist. Law R. Prop. (5th ed.). 372, 373; 4 Kent Comm., 290-312, II Trusts.

3. See preceding note, also § 129, *ante*, in Chapter on Curtesy.

4. See note 2, *supra*, also § 99, *ante*, in Chapter on Dower.

5. Note 2, *supra*.

of Uses, as heretofore explained, and a contingent remainder in trust was not defeated by the destruction or termination of a prior life estate.⁶ A fee upon a fee by way of trust was valid for the same reason that a use upon a use was valid before the statute. In each of these cases the estate involved could be created at law by deed under the Statute of Uses, except in the one case of a contingent remainder after a term of years.⁷

Trusts have gradually developed in equity into a great system of estates. The law of trusts has grown into a separate and distinct branch of the law, applying to personal as well as to real property, a detailed treatment of which is manifestly outside the scope of this work. The application of the rules of the law of property to trusts is treated in connection with the treatment of the different topics in this treatise. A brief summary of the characteristics of the different kinds of trusts in land, and of the more important incidents attaching to them, follows.

§ 198. Express Trusts.—Trusts created by act of the parties with the expressed intent of creating a trust, are express. Though the language used be uncertain or indefinite nevertheless the trust is express if the courts construe the language as expressing an actual intent to create a trust. Implied or resulting trusts are those which courts of equity imply from the facts of the case, where no intention to create a trust has been expressed, but where justice requires that equity declare a trust to exist so that the rights of the parties involved may be worked out accordingly.¹

Express trusts are either active or passive. An active express trust calls for the performance of some active duty on the part of the trustee, such as to manage the trust property, and to turn over the income to the *cestui que trust*, or to mortgage, sell or lease the property and apply the pro-

6. *Abbiss v. Burney*, 17 Ch. Div. 211.

7. See § 194, *ante*.

1. *Bispham's Equity*, § 78. See § 201, *post*.

ceeds to some stated purpose, to accumulate the income from the property involved for the benefit of minors, and the like. A passive trust exists in any case where no active duty is imposed on the trustee, but where he merely holds the legal title, permitting the beneficiary to possess and enjoy the land, collect the rents and profits, and enjoy all the usual incidents of ownership. The trustee of a passive trust must convey to the beneficiary or to another at the beneficiary's direction. He is a mere receptacle of the legal title. These trusts correspond to uses before the Statute of Uses in which no active duty was imposed on the trustee. After the statute they had to be created in the form of a use upon a use as explained in the preceding section. In many of the states statutes have been enacted which provide that trusts of this kind are void as such, but that the legal title shall vest in the person named as *cestui que trust*, exactly as though the land had been conveyed by the ordinary deed directly to the *cestui*.² These statutes in effect abrogate the rule in Tyrrell's case, that a use upon a use survives as a trust, the second use, or trust, being changed into a legal estate by virtue of the modern statute exactly as the first use was so changed by the Statute of Uses. It may be regarded as the rule generally prevailing in the United States that merely passive trusts are void as trusts, the legal title passing to the person named as beneficiary.³

2. N. Y. Real Prop. L., §§ 92, 93; Ind Rev. St. Ch. 28; 1 Stim. Am. St. L. §§ 1701, 1703; Wendt v. Walsh, 164 N. Y. 154; 2 Pom. Eq. Jur. §§ 1003, 1004; Chaplin Exp. Trusts, § 518.

3. Greenl. Cruise Dig. tit. XII. c. 1, § 4, note; 1 Reeves Real Prop. 461.

In a few states the rule of Tyrrell's Case is recognized as law, a passive trust arising in the case of a use upon a use. Guest v. Farley, 19 Mo. 147.

See Price v. Sisson, 13 N. J. Eq. 168, 173, in which case the court recognizes a use upon a use as the usual form in which a trust is created. The court, however, recognizes the rule that where no active duty is imposed upon the trustee, who is simply to permit the *cestui* to receive the rents and profits, no trust arises, the statute executing the use so as to vest the legal title in the *cestui*.

In New York and several other states when an active trust becomes passive, the trustee having performed all the duties imposed by the trust, and having become the mere receptacle of the bare legal title, the trust as such immediately comes to an end, the legal title at once vesting in the beneficiary.⁴ The rule generally prevailing in England and the United States, however, is that the trust will not cease and the legal title will not pass to the beneficiaries in a case where a final conveyance by the trustee is directed by the terms of the trust, though all active duties imposed on the trustee by the trust have been fully discharged and are at an end. Thus where land is given to A as trustee to apply the income to the education and support of the testator's children until the youngest attain the age of 21 years, and thereupon the trustee shall convey the land to such children, the trust does not cease nor does the legal title vest in the children, until such conveyance is made,⁵ though in New York, and the few other states above referred to, the trust on becoming passive would immediately cease, the legal title vesting in the children without conveyance to them. If, however, in the above case the testator had made no provision for a conveyance by the trustee to the children, it is generally held that the trust ceases, its purposes having been performed, the legal title vesting in the children at the moment the youngest attained the age of 21.⁶

A trust created for the purpose of charity is a form of express trust requiring special consideration. A charity

4. N. Y. Real Prop. L., §§ 92, 93; 2 Mich. Comp. L. (1857), p. 824; Hopkins v. Kent, 145 N. Y. 363.

5. England v. Slade, 4 T. R. 682; Obert v. Bodine, 20 N. J. L. 394; 1 Reeves Real Prop., 462.

Where, after the time when the conveyance should have been made, the beneficiary has occupied and en-

joyed the property for several years, a presumption arises that the trustee has conveyed as directed by the trust. Jackson v. Moore, 13 Johns. (N. Y.) 513 (decided before the enactment of the statute above referred to); England v. Slade, 4 T. R. 682.

6. 1 Perry on Trusts, ch. 17.

is a gift to be applied to the benefit of an indefinite number of unascertained persons, either by bringing to them the influences of religion or education, or by relieving them from disease or physical suffering, or by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government.⁷ A gift to be a charity, therefore, must have for its object some public benevolence, which will generally be either religious, educational, eleemosynary or governmental; it must be given for the benefit of an indefinite class of persons, for the public, or some portion of the general public, not limited to the benefit of any definite individuals, or class of individuals. In other words it must be a public as distinguished from a private benefaction. A gift for any general charitable or benevolent purpose which is public and not private is a charity in the legal sense.⁸ The indefiniteness of the beneficiaries, and the charitable or benevolent purpose are the distinguishing characteristics of a charitable trust. Thus a trust to establish and maintain a school for the benefit of persons named and of their families is not a charity because private; if given to maintain a school for the benefit of all persons who may be admitted to the school it is a charity because for the benefit of an indefinite and unascertained part of the general public. For the same reason a fund raised by an association by collecting dues from its members to be used for their mutual benefit in case of illness, death or disability of any member is not a charity, though the members of the association may constitute a considerable percentage of the public, since the benefits are limited to definitely ascertained individuals.⁹

Laws governing the enforcement of charitable trusts, the removal and appointment of trustees, questions arising

7. *Jackson v. Phillips*, 96 Mass. 539, *Alcock*, 108 N. Y. 312; *Bullard v. Meighan v. Stevens*, 203 N. Y. 380. *Chandler*, 149 Mass. 532.

8. *Perry on Trusts*, § 710; *Russel v. Allen*, 107 U. S. 163; *Holland v. Coe v. Washington Mills*, 149 Mass. 543; *Perry on Trusts*, § 732.

with reference to the indefiniteness or uncertainty of the class of persons or charitable institution to be benefited, and the like, belong to the subject of trusts, and cannot be adequately treated in a general treatise of this character. That charities are not subject to the rule against perpetuities will appear in a subsequent chapter dealing with that topic.¹⁰

10. See Ch. XIV, *post*.

In New York charitable trusts are one of the five classes of express trusts permitted by the statutes of that state. See § 113 of the N. Y. Real Property Law. For the complete act regulating charitable trusts of both real and personal property. See laws of 1901, ch. 291, amending laws of 1893, ch. 701.

Before the enactment of this statute it had been finally decided that the English system of charitable trusts did not exist in New York. A gift to a charity in New York, to be valid in perpetuity, involved a gift to a corporation organized for the purposes of charity, the charitable corporation taking outright, subject to its duty to the state as a quasi-public corporation to use the gift for the charitable purposes for which it was intended. No charitable trust at all arose in such case. Therefore a gift for the purposes of charity failed if not given to some corporation organized, or to be organized in the future within two lives, for some charitable purpose or purposes. *Tilden v. Green*, 130 N. Y. 29; *Bird v. Merkle*, 144 N. Y. 544; *Matter of Ingersoll*, 131 N. Y. 573. The Tilden trust failed because after providing for the incorporation of a corporation to be known as the Tilden Trust within the lives of two persons in be-

ing, to which the gift of \$3,000,000 was then to be transferred by Mr. Tilden's executors for the purpose of a public library in New York City, he provided that the executors might, in their discretion, use any part or all of the gift for such other charitable purposes as would be, in their judgment, "most widely beneficial to the interests of mankind." The court construed this as authorizing the executors to apply the gift to any charity, which might or might not be the corporation so provided for. As a trust it failed, since not permitted by the statutes, and as a power in trust because of the indefiniteness of the beneficiaries. The statute above referred to (L. of 1893, ch. 701, as amended by L. of 1901, ch. 291), changed the law in New York by restoring charitable trusts as they exist in England and the different states, and providing further that no such trust shall be deemed invalid by reason of the indefiniteness or uncertainty of the beneficiaries. Therefore the general rules stated in the text as governing charitable trusts apply to such trusts in New York, and while under the law generally prevailing a charitable trust will fail when the class of persons who are to be the beneficiaries are not designated in any way, and no trustee is appointed having the power to desig-

§ 199. **Creation of Express Trusts.**—Before the Statute of Frauds trusts could be created by parol, without special formality of any kind, except, perhaps, that trusts in those interests which required deeds of grant for their creation and transfer, could be created only by similar grants.¹ The seventh section of the statute provided that “all declarations or creations of trusts, or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing” signed by the person creating the trust, or by his will, otherwise they were void. All implied trusts were expressly excepted by the eighth section of the statute. The ninth section provided that grants or assignments of trust estates must be in writing, signed by the grantor or assignor.² The statute does not apply to trusts in personal property, though trusts for a term of years in land are included within its terms.³ The English statute has been generally followed in the United States.⁴ The statute does not require that the trust be created by a writing—it need only be manifested and proved by a writing made some time after the trust has been created. This writing need not be in the formal shape of a deed in trust, but may take any form such as letters, loose memoranda or the like, signed by

nate such class, in New York the courts will appoint such a trustee whose duty it will be, subject to the supervision of the court, to decide to what specific charitable purposes and institutions the gift shall be applied. See *Reeves Real Prop.*, § 337; *Meighan v. Stevens*, 203 N. Y. 380.

1. 2 *Sand Uses & Trusts*, 1-8; 1 *Perry, Trusts*, § 75.

2. 29 *Car. II Ch. 3*, §§ 7, 8 and 9.

3. *Matter of Carpenter*, 131 N. Y. 86; *Hirsh v. Auer*, 146 N. Y. 13, 19; 1 *Perry, Trusts*, § 86.

A parol trust of realty though void as such, will be enforceable if the trustees, pursuant to the trust, have

converted the land to personalty, the trust then being a trust in personal property unaffected by the Statute. *Bork v. Martin* 132 N. Y. 280; *In re Simond's Est.*, 201 Pa. St. 413, 417.

4. N. Y. Real Prop. Law § 242; *Ind. Rev. Stat.* (1881) § 2969; 1 *Ames Cas. Trusts*, 176; 1 *Stim. Am. St. L.* § 1710; *Blodgett v. Hildreth*, 103 Mass. 484, 486; (writing insufficient, failing to identify property and to state terms of trust); *Begole v. Hazzard*, 81 Wis. 274 (parol trust voidable only at election of trustee); *Hirrie v. Ingraham*, 125 Ill. 198; *Perry, Trusts*, § 75.

the person who created the trust, provided it contain a sufficient statement of the terms of the trust, a description of the property affected, and a statement of the beneficiaries and of their respective interests.⁵ The assignment of a trust is governed by the same rules, a parol assignment being good if followed by a sufficient writing as evidence thereof.⁶

Technical words are not required in creating an express trust. If the intention to create a trust is clearly expressed, the subject matter of the trust clearly indicated, and the beneficiary of the trust named with certainty, a trust arises whatever form the instrument may take and whether express words of trust are used or not. The legal title may be conveyed by one instrument and the declaration of trust which must be executed and delivered at the same time,⁷ may be in an entirely different instrument.⁸ The declaration of trust may be contained in several distinct papers, provided they refer to one another so that they may be construed together.⁹

The more usual express trust is created by a conveyance or devise of the legal title to a third party as trustee for purposes expressed in the deed or will. No consideration is required, equity recognizing and enforcing the trust because the legal title has been transferred to the trustee for the purposes of the trust.¹⁰ But in a case where, instead of a completed transfer of the legal title there is only a promise to transfer the property to a trustee to hold in trust for another, equity will not enforce the promise if there be

5. 1 Ames Cas. Trusts 178; Finley v. Issett, 154 U. S. 561; Hutchins v. Van Vechten, 140 N. Y. 115; Urann v. Coates, 109 Mass. 581; Leslie v. Leslie, 53 N. J. Eq. 275; McVay v. McVay, 43 N. J. Eq. 47; Roberts App., 92 Pa. St. 407; Kingsbury v. Burnside, 58 Ill. 310; Perry Trusts §§ 82, 84, 85.

6. Wright v. Wright, 1 Ves. Sr. 409; 1 Spence Eq. Jur. 506.

7. 1 Perry, Trusts § 77.

8. Wood v. Cox, 2 Myl. & Cr. 684.

9. Knowlton v. Atkins, 134 N. Y. 313; McAuley's Est. 184 Pa. St. 124; Kingsbury v. Burnside, 58 Ill. 310; Urann v. Coates, 109 Mass. 581; Garnsey v. Gothard, 90 Cal. 603.

10. Perry, Trusts, §§ 96-99; 1 Ames Cas. Trusts, 125.

no consideration to support it. Therefore a mere voluntary agreement to transfer or devise property in trust is void. But in any case where the promise is supported by a valid consideration, as where the owner has promised to convey land in trust for another in consideration of the payment or the return of something of value, or of the promise thereof, or in consideration of a marriage to be consummated, or the like, equity will enforce the executory promise, declaring and enforcing the trust in favor of the beneficiary.¹¹ The rule is the same whether the instrument containing the promise is under seal or not.¹² Consideration of blood or marriage is not enough to cause equity to enforce an executory agreement of this kind.¹³ In a few states, however, the view is taken that such an agreement in favor of a wife or child will be enforced by equity, though entirely without consideration other than the relationship existing.¹⁴

Trusts are also frequently created by a declaration of trust on the part of the owner in favor of another, without any conveyance to a third person as trustee, the owner becoming trustee for the beneficiary by virtue of his declaration of trust. Here, also, the transaction is completed, not executory, and no consideration is necessary.¹⁵ In case of a mere executory promise to become trustee for the beneficiary at some future date a consideration is necessary, as in the case of a promise to convey to a third party as trus-

11. 1 Ames Cas. Trusts, 125; Merrill v. Peaslee, 146 Mass. 460; Young v. Young, 80 N. Y. 422; Padfield v. Padfield, 68 Ill. 210; 72 Ill. 322; 1 Perry Trusts, § 95, *et seq.*; 2 Pom. Eq. Jur. §§ 996-999.

12. Hall v. Lamb, 2 Eden 292, 294; Dennig v. Ware, 22 Beav. 184. See 1 Perry, Trusts, § 111.

13. Matter of James, 146 N. Y. 78, the court saying (p. 93): "The general principle is established that in no case whatever will courts of equity

interfere in favor of mere volunteers, whether it be upon a voluntary contract or a settlement, however meritorious may be the consideration, and although they stand in the relation of a wife or child." To the same effect, Campbell's Est., 7 Pa. St. 100.

14. Landon v. Hutton, 50 N. J. Eq. 500; Leper v. Taylor, 111 Mo. 312.

15. Culbertson v. Witbeck, 127 U. S. 326; James v. Falk, 50 N. J. Eq. 468; Lewin, Trusts (9th ed.), 66; Perry, Trusts, § 38.

tee, and what was said above in that connection applies equally to this situation. The prevailing view is that an executed declaration of trust must be delivered to the beneficiary or to a third person for him before it becomes binding.¹⁶ There is, however, considerable authority to the effect that the declaration of trust need not be delivered, it appearing that it was executed with the intention of making it immediately operative without delivery.¹⁷

If the deed or will contains words of prayer, request, hope, expectation or desire that the devisee or grantee use the property for certain stated purposes, the modern rule is that such words convey a mere request, and not an obligation of any sort either at law or in equity. Therefore in the usual case, no trust arises from the use of such expressions.¹⁸ But in any particular case, if it appears from all the circumstances that the words were used in the sense of a direction or command expressed in the form of a request or prayer, they will be so construed, and equity will recognize and enforce the trust thus created.¹⁹

§ 200. Statutory Changes Affecting Express Trusts.—In the preceding section it is explained how passive or inactive trusts are void as such and take effect as actual conveyances or devises of the legal title to the person named as beneficiary of the attempted trust, either by express statutory

16. *Wadd v. Hazelton*, 137 N. Y. 215; *Govin v. De Miranda*, 76 Hun N. Y. 414. See *Tarbox v. Grant*, 56 N. J. Eq. 199, holding that a deed disposing of a trust estate as a family settlement was good without actual delivery.

17. *Clavering v. Clavering*, 2 Vern. 473; *Smith's Estate*, 144 Pa. St. 428. See *Chaplin on Express Trusts and Powers*, § 78.

18. *Ames Cas. Trusts*, 85-106; 2 *White & T. Lead. Cas. Eq.*, 1859,

et seq.; *Hill v. Hill*, 1 Q. B. 483; *Colton v. Colton*, 127 U. S. 300; *Collister v. Fassitt*, 163 N. Y. 281; *Clay v. Wood*, 153 N. Y. 134; *Murphy's Est.*, 184 Pa. St. 310, 314; *Dexter v. Evans*, 63 Conn. 58; *Eberhardt v. Porolin*, 49 N. J. Eq. 570; *Aldrich v. Aldrich*, 172 Mass. 101.

19. *Ames Cas. Trusts*, 78; 1 *Perry, Trusts*, 112-116; *In re Adams and Kensington Vestry*, L. R. 27 Ch. Div. 394, and cases in preceding note.

provision or by decision in most of the states, while in New York and several other states such a trust is impossible, since an active trust ceases as soon as it ceases to be active, the legal title vesting at once in the ultimate beneficiaries without a conveyance to them from the trustee. In England and most of the States express active trusts may be created for any purpose not contrary to public policy, provided the trust does not violate the rule against perpetuities. In New York, however, express trusts can be created for only five purposes, as provided by statute.¹

1. Sec. 96 of the N. Y. Real Property Law permits the creation of trusts for the following purposes, all others, except charitable trusts being prohibited. (1) To sell real property for the benefit of creditors. Assignments by insolvents to a trustee for the benefit of creditors are the usual cases of trusts under this division. See N. Y. Gen. Assignment Act, Laws of 1877, ch. 466. (2) To sell mortgages or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon (3) to receive the rents and profits of real property and apply them to the use of any person, during the life of that person, or for any shorter term, subject to the provisions of law relating thereto.

These are the usual active trusts to control and manage the property and to turn over the income. They are limited in New York to the life of the beneficiary. They may be created for the benefit of two or more persons, but the trust must come to an end at the expiration of the lives of two designated persons in being at the time the trust is created, since these trusts suspend the absolute power of alienation, and the statute

in New York permits such suspension for two lives only. See Ch. XVI, *post.* § 103, of the N. Y. Real Property Law provides that the beneficiary of this form of trust cannot transfer his interest under the trust, hence the absolute power of alienation is suspended since the property affected can be conveyed only subject to the trust, though the beneficiary join in the conveyance with all others interested. By § 98 of the same statute creditors of the beneficiary of a trust of this kind may in equity reach only so much of the rents and profits as are not required for the education and support of the beneficiary. This provision also applies to trusts to accumulate, or the fourth class of express trusts provided for by § 96. Thus spendthrift trusts, to this extent, are expressly authorized. It is obvious that this rule does not apply to a trust created for the benefit of the man creating it, directing that the income be paid to him during his life. The entire interest of such a beneficiary may be reached by his creditors. 2 Rev. St. 135 Pl.; *Young v. Heermans*, 66 N. Y. 374; *Schenck v. Barnes*, 156 N. Y. 316. See *Fowler's Real Prop. Law* (3d ed.), 479. Similar

An attempted trust created for any other lawful purpose is void as a trust, and no title vests in the trustee, but if it is an attempted trust to mortgage or to sell real property, or to accomplish any other lawful purpose not included within the five express trusts which are permitted by the statute, it will be valid as a power in trust, if it is of such character that it can be given effect and enforced as a power. The legal title passes to the heir or residuary devisee of the testator, or to those who would take if no trust had been attempted, subject, however, to the power, which exists in the person named as trustee and which he must exercise for their benefit in accordance with the terms of the void trust, which is thus actually enforced and given effect as a power, the beneficiaries receiving the practical benefits of the provision as effectually and completely as though the trust were valid. The legal title, however, does not pass to the so-called trustee, but remains in those who would be the owners of the property had no trust been attempted to be created, subject to the power in trust as above explained.² A few other states have similar

statutes have been enacted in other states. N. J. Gen. Stat., p. 1424, § 43 (all incomes over \$4,000 may be reached by creditors of the *cestui*); Linn v. Davis, 58 N. J. L. 29; Spring v. Randall, 107 Mich. 103. (4) To receive the rents and profits of real property and to accumulate the same for the purposes, and within the limits, prescribed by law. By § 61, accumulations are valid only during the minority of each of the beneficiaries, each beneficiary receiving the accumulated incomes upon his attaining the age of 21, any direction for a further accumulation being void as to the excess, the accumulation being good up to the time each beneficiary attains that age. The accumulation must begin during minority and, if

the beneficiaries or any of them are not in being, it must be limited to begin within the period of two lives in being. Hascall v. King, 162 N. Y. 134; Smith v. Parsons, 146 N. Y. 116, 120; Cook v. Lowry, 95 N. Y. 103. (5) In addition to these four classes of express trusts, trusts for "religious, educational, charitable or benevolent uses" are now expressly provided for by § 113 of the N. Y. Real Property Law. Charitable trusts in New York are briefly discussed in section 198 preceding, note 10.

2. N. Y. Real Prop. L., §§ 97, 99; Lent v. Howard, 89 N. Y. 169; Townsend v. Frommer, 125 N. Y. 446, 459; Coann v. Culver, 188 N. Y. 9; Van Norden Trust Co. v. O'Donohue, 122 App. Div. (N. Y.) 51.

statutory provisions.³ These statutes, in so far as they limit the purposes for which trusts may be created, do not apply to trusts in personal property, such trusts being permitted as before for any lawful purpose, provided the rule against perpetuities is not violated.⁴

§ 201. Implied Trusts; Resulting and Constructive.—Trusts which are implied by equity in order that justice may be done between the parties, there being no expressed intent to create a trust, are called implied trusts. They are generally divided for the purposes of discussion into resulting and constructive trusts, those implied by equity because the parties may fairly be presumed to have intended the trust, though they have failed to express it in any form, being generally classed as resulting trusts, while those arising without attendant circumstances from which such intent may be presumed, but implied by equity in order that justice may be done between the parties are called constructive. All these trusts depend on the same fundamental principles, and this classification is of value only for purposes of discussion, and is not always recognized by the courts. The equitable rights and liabilities of the parties do not in any way depend on this classification, the existence of the trust depending on the facts of each case—whether those facts present a case for the interposition of a court of equity in order that adequate relief may be given and justice done, the trust in both classes of cases being created by the court and not by the parties.¹

The most important case of a resulting trust arises where

3. See similar statutes in Michigan and Wisconsin.

4. *Cochrane v. Schell*, 140 N. Y. 516, 534; *Russell v. Hilton*, 80 App. Div. (N. Y.) 178, 187.

1. 1 Perry. Trusts, §§ 85, 86, 124, 166. See cases in notes under this and the following sections.

It should be remembered that the Statute of Frauds, and equivalent statutes in the different states, expressly except trusts implied by law from their operation, so that no writing is necessary in the creating of the trusts now under consideration.

the legal title is taken by one man while the consideration is paid by another. At law the man who paid the purchase price would have no interest in the land. In equity, however, he is regarded as the owner, the presumption being that no gift was intended, and justice requiring that he who paid for the land should have the beneficial ownership. Therefore equity accomplishes the result which justice requires by implying a trust, the taker of the legal title holding as trustee for the benefit of the man who paid for the property.²

No such trust will be implied, since obviously justice would not require it, in any case where it appears that the parties intended a result inconsistent with a trust. Therefore if a gift of the purchase money or a loan thereof was intended, or where an express trust with different terms is expressed in writing, no trust will be implied.³ For the same reason, if the person supplying the purchase money is the husband or father of the one taking title no trust is implied, since the obligation to support or care for the wife or child in such case may be taken as the reasonable purpose of the purchase, and justice does not require the interference of equity.⁴ If it appears, however, by affirmative evidence, that a gift was not intended, but the purchase was in fact for the benefit of the husband or father, a trust will

2. 1 Perry, Trusts, § 126; 1 White & T. Lead. Cas. Eq. 314, and notes; Dyer v. Dyer, 2 Cox 92; Boyd v. McLean, 1 Johns. Ch. (N. Y.) 582; McGowan v. McGowan, 14 Gray (Mass.) 119; Bermger v. Lutz, 188 Pa. St. 364; Jacksonville Nat. Bank v. Beesley, 159 Ill. 120; Champlin v. Champlin, 136 Ill. 309 (semble).

3. Walsh v. McBride, 72 Md. 45; Strimpfler v. Roberts, 18 Pa. St. 283; Wheeler v. Kirtland, 23 N. J. Eq. 13, 22; White v. Carpenter, 2 Paige (N. Y.) 217; Jacksonville Nat. Bank v.

Beesley, 159 Ill. 120, 125; Bayles v. Baxter, 22 Cal. 575; 1 Perry, Trusts, §§ 133, 139, 140.

4. 1 Perry, Trusts, § 143; Dyer v. Dyer, 2 Cox 93; Goelz v. Goelz, 157 Ill. 33; Kern v. Howell, 180 Pa. St. 315; Bowser v. Bowser, 82 Pa. St. 57; Hallenback v. Rogers, 57 N. J. Eq. 199.

As between brothers or other relatives, there being no duty on the part of one to provide for the other, a trust will be implied. Edwards v. Edwards, 39 Pa. St. 369.

be implied.⁵ In case of a conveyance to a third party in order to hinder, delay or defraud the creditors of the man who paid for the property, though a trust may be implied in favor of the creditors because of the fraud, equity will refuse to imply and enforce a trust in favor of the fraudulent debtor, since equity will refuse to act in favor of a wrongdoer in order to save him from the legal effects of his own wrongful act.⁶

In New York and many of the states this implied trust has been modified by statute providing that in such case no trust shall result except for the benefit of the creditors of the man paying the purchase price to the extent of their demands in case an intent to defraud them is not disproved, and except that a trust will result as before in any case where the legal title is taken by the third person without the knowledge of the principal or in violation of some trust.⁷ The courts, however, have construed this statute as applying to cases where no additional facts appear other than the bare purchase and payment of the consideration by the principal and the taking of title by the third person. If additional facts appear requiring relief in equity in order that justice may be done a trust will be implied because of such additional facts, the statute not applying. Thus where real property is purchased with partnership funds for partnership purposes, the legal title being taken in the name of one partner only, or in the name of any stranger, a trust is implied in favor of the firm, the statute not applying because of the additional fact that the property was acquired for the firm, to be held by the partner or stranger for

5. *Smithsonian Inst. v. Meech*, 169 U. S. 398; *Jackson v. Matadorf*, 11 Johns. (N. Y.) 91; *Jaquith v. Mass. Baptist Conv.*, 172 Mass. 439; *Perkins v. Nichols*, 11 Allen (Mass.) 542; *Corr's App.*, 62 Conn. 403, and cases in preceding note.

6. *Prosens v. McIntyre*, 5 Barb. (N.

Y.) 424; *Baldwin v. Campfield*, 4 Halst. (N. J.) 891; *Cutler v. Tuttle*, 19 N. J. Eq. 549, 562.

7. N. Y. Real Prop. Law, § 94; 1 Stim. Am. St. L., § 1706; *Tiffany v. Tiffany*, 110 Mich. 219; *Toney v. Wondling*, 138 Ind. 228; *Haaven v. Hoass*, 60 Minn. 313.

firm purposes.⁸ On the same principle, in any case in which the third party taking title does so under an express promise, in writing or by parol, to convey the property to the principal who paid the purchase price, or at his direction, equity will specifically enforce the contract to convey though it be by parol, and therefore unenforceable at law under the Statute of Frauds. Since the contract has been executed on one side, the position of the principal has been changed by his paying over the purchase money, and justice requires that it be specifically carried out on the part of the third party who has taken title.⁹ In other words a trust is implied from the agreement to convey not merely from the payment of the consideration, and the statute in question does not apply. Such an agreement may be, and generally is, implied from the facts in the usual "dummy" transaction, so called in general practice, where title is taken in the name of a third person who is neither wife or child of the principal, and where the transaction is not in fraud of his creditors.¹⁰ The statute, therefore, in actual practice, has a very limited application.

A resulting trust also arises where property is given to a trustee as such, but the intended express trust fails because not properly declared, or because its purpose is illegal or in violation of some rule of law, or because the beneficiary is not named or dies before the testator.¹¹ Such a trust is also implied where, after the trust has been administered by the trustee, part of the trust property remains undisposed of, since not required for the purpose of the trust, as where land is given to a trustee to pay debts,

8. *Fairchild v. Fairchild*, 64 N. Y. 471.

9. *McKinley v. Hessen*, 202 N. Y. 24; *Smith v. Balcom*, 24 App. Div. 437; *Robbins v. Robbins*, 89 N. Y. 251; *Wood v. Rabe*, 96 N. Y. 414, 425.

10. See preceding note.

11. *Hill on Trustees*, 113. 114; 1

Perry, Trusts, §§ 150-160; 1 *White & T. Lead. Cas. Eq.* 1171, notes; *O'Connor v. Gifford*, 117 N. Y. 275, 281; *Mosher v. Funk*, 194 Ill. 351; *Nichols v. Allen*, 130 Mass. 211; *Roy v. Munroe*, 47 N. J. Eq. 356; *Phillips v. Ferguson*, 85 Va. 509.

and only part of the proceeds from its sale are required for that purpose.¹² In these cases equity implies a trust as resulting in favor of the grantor or his heirs, or the heirs of the testator or his residuary devisee, as the case may be, it being apparent that no beneficial interest was given to the trustee, justice therefore requiring that he should hold in trust for the person or persons who would be entitled to the property had no trust been created, in accordance with the presumed intent of the creator of the trust. If any consideration is paid or recited in the instrument conveying the land no such trust results, since the intent to make the grantee beneficial owner would be manifest.¹³ The essential feature is that the conveyance or devise be made to one who is to hold in trust and not for his own benefit.

A conveyance to a third party without consideration either paid or recited in the deed, or without a consideration of blood, resulted in a use in favor of the grantor before the Statute of Uses.¹⁴ The effect of the statute on such a use was to convert it into a legal estate, the feoffor remaining the owner, the attempted conveyance, therefore, having no effect after the statute. Since the enactment of the statute, though a trust would be implied in favor of the grantor in such case according to the older cases, where a common law conveyance was used, it is clear that no such result could follow a conveyance by deed of bargain and sale or other conveyance under the Statute of Uses, the use in favor of the grantee being always expressly declared in such conveyances.¹⁵ Under the modern cases no trust results from mere absence of consideration, the obvious intent to make a gift, completed by the conveyance, being recognized and given effect.¹⁶ Additional affirmative evi-

12. *Morice v. Bishop of Durham*, 9 Ves. 399, 10 Ves. 522; *McElroy v. McElroy*, 113 Mass. 509; *Hopkins v. Grimshaw*, 165 U. S. 342; *Schlesinger v. Mallard*, 70 Cal. 326.

13. *Brown v. Jones*, 1 Atk. 188;

Anderson v. Blood, 152 N. Y. 285.

14. See § 194. *ante*.

15. 1 Perry, *Trusts*, § 162; *Coffey v. Sullivan*, 63 N. J. Eq. 296. See cases in note following.

16. *Goldsmith v. Goldsmith*, 145 N.

dence that a gift was not intended will, however, give rise to a resulting trust.¹⁷ Another class of resulting trusts arises where a trustee or other fiduciary purchases land with trust funds held by him for another. Here it is quite immaterial what the intent of the fiduciary was, whether to purchase for himself in violation of his duty to his principal, or in trust for him. In either case justice requires that the property be held by him in trust for his principal whose funds were used in paying for the land.¹⁸ In any case where a fiduciary, such as a trustee, guardian, executor, director or other officer of a corporation, and the like, or an agent, clerk or other employee, takes title to land in his own name, using his principal's or employer's money in paying therefor, a trust results in favor of the employer or principal.¹⁹

Y. 313 (but if fraud is shown a resulting trust arises); *Rogers v. N. Y. & Tex. L. Co.*, 134 N. Y. 197 (when no gift intended, slight evidence sufficient to prove a trust); *Fitzgerald v. Fitzgerald*, 168 Mass. 488; *Gould v. Lynde*, 114 Mass. 366; *Lovett v. Taylor*, 54 N. J. Eq. 311; *Osborn v. Osborn*, 29 N. J. Eq. 385; *Stevenson v. Crapnell*, 114 Ill. 19; *Moore v. Horsley*, 156 Ill. 36.

That the presumption is the other way seems to be still the law in some states, and also in England under the later cases. *Griffen v. Taylor*, 139 Ind. 573; *Bowler v. Curler*, 21 Nev. 158; *In re Duke of Marlborough*, 2 Ch. 133. See *Lewin, Trusts* (9th ed.), 151; *Story Eq. Jur.*, § 1197.

The old rule that a use resulted from a common law conveyance with no consideration given or recited undoubtedly grew out of the fact that such conveyances to secret uses were so frequent and general that the only reasonable presumption to be drawn from a conveyance made without con-

sideration was that the parties intended a conveyance to uses and not a gift. The situation is entirely different to-day. The conveyance of the bare legal title to a trustee with no active duty to discharge would be void to-day if so made in express terms. Such a conveyance is seldom if ever made. Therefore the reason for the old rule no longer exists, and the modern rule that such a conveyance is a gift or will be recognized and enforced as such, unless it appear affirmatively that the parties intended a trust, is in accord with the situation now existing.

17. *Hill on Trustees*, 170; *Clavering v. Clavering*, 2 Vern. 473.

18. 1 *Perry on Trusts*, § 127; *Holmes v. Gilman*, 138 N. Y. 369 (between partners); *Warren v. Union Bank*, 157 N. Y. 259 (guardian and ward); *Union Stock Yds. v. Gillespie*, 137 U. S. 411; *Standish v. Babcock*, 52 N. J. Eq. 628; *Preston v. Preston*, 202 Pa. St. 515.

19. *Day v. Roth*, 18 N. Y. 448

Even where the property is acquired with stolen funds a trust results in favor of the person whose funds were thus used, against the thief or against a subsequent purchaser from the thief, provided he purchased with notice of how the thief acquired his title.²⁰

§ 202. Constructive Trusts.—Constructive trusts are those implied by equity in order that adequate relief may be given and justice done, though no intent on the part of the person holding title as trustee to subject himself to any such responsibility can be inferred or presumed. When by fraudulent representations, or fraud in any form, a wrongdoer induces the conveyance of the legal title to himself equity will compel him to hold the property as constructive trustee for the person defrauded, equity setting aside the conveyance because of the fraud and compelling him to account as trustee for the property during the time the title was vested in him.¹ All the elements of legal fraud must be present, viz.: a false representation of material fact, knowingly made with intent to deceive, which the party defrauded had reasonably a right to rely upon and which he did in fact rely and act upon to his damage.

Where conveyances or devises of land are prevented by fraud equity declares constructive trusts in favor of those to whom the property would have gone had there been no fraud. This is illustrated by heirs or devisees fraudulently inducing a testator to refrain from making devises or charging the land devised with legacies. They will take the land as trustees for those persons to whom the testator would otherwise have given the property, or subject to the legacies which he would otherwise have charged against it.²

(agent and principal); *Union Nat. B. v. Goetz*, 138 Ill. 127; *Kennedy v. McCloskey*, 170 Pa. St. 354; *Church v. Sterling*, 16 Conn. 388; *Durling v. Hammar*, 20 N. J. Eq. 220.

²⁰ *Newton v. Porter*, 69 N. Y. 133 (right to follow proceeds of stolen

property into hands of taker with notice).

1. *Bacon v. Bronson*, 7 Johns. Ch. (N. Y.) 194; *Ahrens v. Jones*, 169 N. Y. 555; *Henschel v. Mamero*, 120 Ill. 660; *Huxley v. Rice*, 40 Mich. 73.

2. *Dyer v. Dyer*, 1 White & T.

Constructive trusts also arise in cases of any acquisition of property from a *cestui que* trust or principal by a trustee, agent or other fiduciary, unless it appear that the transaction was made in good faith. He is bound by his fiduciary position to exercise the highest good faith in dealings with his principal, and in any case in which he secures title to his principal's land the transaction will be closely scrutinized, and unless it appear that the transaction was in entire good faith without injury to the principal the fiduciary will be charged with the property as trustee. He is not permitted to take any advantage of his principal or client by means of the fiduciary relation resulting in benefit to himself and damage to them.³

Fraudulent conveyances made to hinder, delay and defraud creditors, or made to defraud a subsequent purchaser of the same land, made without consideration or to one having notice of the fraudulent purpose, is another situation in which equity will construct a trust to give an adequate remedy to the defrauded parties, the fraudulent purchaser holding in trust for them.⁴ In general, equity will construct a trust in any case where the title of the purchaser is tainted with fraud, and where in equity and good conscience the property should be turned over to another or

Lead. Cas. Eq. 352; *Oliffe v. Wells*, 130 Mass. 221, 224; *Williams v. Vreeland*, 29 N. J. Eq. 417.

So if the devise or bequest is secured on a promise to hold in trust for a third person, the trust will be declared and enforced accordingly. *Dowd v. Tucker*, 41 Conn. 197; *Hoge v. Hoge*, 1 Watts (Pa.) 163, 213; *Kine v. Farrell*, 71 App. Div. (N. Y.) 219 (agreement not to change a will enforced as trust); *Amherst College v. Rich*, 151 N. Y. 282; *Fairchild v. Edson*, 154 N. Y. 199; *Edson v. Parsons*, 155 N. Y. 555.

3. 1 Perry, Trusts, §§ 194-210; Fox

v. Mackreth, 1 White & T. Lead. Cas. Eq. 188, and notes; *Adams v. Cowen*, 177 U. S. 471, 484; *Bernard v. Gantz*, 140 N. Y. 249; *Hammell v. Hyatt*, 59 N. J. Eq. 174; *Trotter v. Smith*, 59 Ill. 240; *Herr v. Payson*, 157 Ill. 244; *Boyer v. East*, 161 N. Y. 580; N. Y. Code Civ. Pro., § 1679; *McClellan v. Grant*, 83 App. Div. (N. Y.) 599.

4. *Ellison v. Ellison*, 1 White & T. Lead. Cas. Eq. 245, and notes; *Metcalf v. Moses*, 161 N. Y. 587; *Stewart v. Exch. Bank*, 55 N. J. Eq. 795; *Fidler v. John*, 178 Pa. St. 112; *Carr v. Briggs*, 156 Mass. 78; *Bump, Fraudulent Conv.* 197.

applied to the satisfaction of his claims. The details of the law applying to these questions belong to the subject of equity jurisdiction rather than to the law of land and its ownership.

A contract for the sale of *real property* enforceable by specific performance gives rise to a trust created by equity in order to give the purchaser adequate relief, the vendor holding the legal title, pending the actual conveyance, as trustee for the purchaser. The money damage which the purchaser could recover at law for breach of contract is not an adequate remedy, since he is entitled to the specific thing, the land, for which he contracted. Therefore equity will compel specific performance of the contract, ordering the vendor to convey the land in accordance with the terms of the contract of sale. For this purpose and for the purpose of restraining the vendor from any act of destruction pending the conveyance which would cause permanent damage to the property, the vendor holds as trustee for the vendee.⁵ The vendor occupies as owner in his own right, however, in so far as the rents and profits and right to enjoy the property are concerned during the time intervening between the contract and the conveyance.⁶ Nevertheless in most jurisdictions it is settled that the vendee is so far the owner of the land during this interval that in case of damage or destruction of buildings or other improvements on the premises the loss falls on the vendee, who is bound to accept the property in its damaged condition without any deduction from the purchase price, provided such damage or destruction is not due to the wrongful act or negligence of the vendor.⁷ The reason given for this rule, that "equity re-

5. 1 Perry on Trusts, § 231; Williams v. Haddock, 145 N. Y. 144; Matter of Davis, 43 App. Div. (N. Y.) 331; Keep v. Miller, 42 N. J. Eq. 100; Felch v. Hooper, 119 Mass. 52; Lombard v. Chicago Sinai Cong., 64 Ill. 477.

6. Raynor v. Preston, L. R. 18, Ch.

D. 1; Castellain v. Preston, L. R. 11, Q. B. Div. 390; Home Mut. Ins. Co. v. Tompkins & Co., 30 Tex. Civ. App. 404.

7. Lewin, Trusts, 148; Sewell v. Underhill, 197 N. Y. 168; Reed v. Lukens, 44 Pa. St. 200; Lombard v. Chicago Sinai Cong., 64 Ill. 477.

gards that as done which ought to be done," has no application, since during this interval there is nothing under the contract which either party ought to do. The vendor is bound to convey only when the date for closing of title as fixed by the contract is reached, and the purchase money is not payable until then. After breach of the contract the action for specific performance accrues, and there is at that time sound reason for declaring a constructive trust to exist in favor of the purchaser. But before that time no action for specific performance has arisen, nor has any wrong been committed by the vendor. He is still the owner of the property, and the vendee is the owner of a contractual right only. There is no reasonable ground for implying or presuming that the parties intended a trust, since the vendor is to continue in the possession and enjoyment of the property as owner, without any duty to account for the rents and profits. Nevertheless for the purposes other than the enjoyment of the property and the receipt of the rents and profits a trust is constructed by equity between them, so that the purchaser is so far owner that his interest will descend to his heirs on his death during this interval, and his widow is entitled to dower therein;⁸ and on the death of the vendor his heir inherits the legal title only as trustee, and must convey to the purchaser his heirs or assigns.⁹ A purchaser with notice also takes subject to the trust.¹⁰

§ 203. Purchase for Value Without Notice.—Implied trusts, whether resulting or constructive, usually do not appear as a matter of record in the title to land, and therefore if the legal title is conveyed by the trustee to one who

8. *Young v. Young*, 45 N. J. Eq. 27; *Owen v. Robbins*, 19 Ill. 545; *Williams v. Kinney*, 43 Hun (N. Y.) 1.

9. *Thomson v. Smith*, 63 N. Y. 301; *Matter of Davis*, 43 App. Div. (N. Y.) 331; *Morgan's Heirs v. Morgan*, 2 Wheat. (U. S.) 290.

10. *Champion v. Brown*, 6 Johns. Ch. (N. Y.) 403; *Glover v. Fisher*, 11 Ill. 666; *Linscott v. Buck*, 33 Me. 530; *Borie v. Slatterthwaite*, 180 Pa. St. 542.

pays value for the property and who takes it without notice of the trust, the equitable right existing in the beneficiary is gone, since the equity of such a purchaser is equal at least to the equity of such beneficiary, and a court of equity in such a case will not disturb the legal title.¹ This doctrine applies to equitable rights of all descriptions, whether a trust exist or not, such equitable rights being cut off or destroyed by a conveyance to a purchaser for value without notice of the equities involved in the case. The same doctrine applies to express trusts, but as such trusts must be in writing, and as instruments creating or declaring them must usually be recorded to be valid as against a subsequent purchaser for value and without notice, occasions for the application of the doctrine to express trusts seldom arise.²

If the purchaser has actual notice of the existence of the trust he takes title subject thereto, and holds as did the trustee, irrespective of the source of the notice or the means by which it was given him.³ If he has no direct and positive notice of the trust as such, but has notice of facts which would arouse the suspicions of the average man and cause him to make inquiry as to the existence of rights to the property in the *cestui que* trust, he is a purchaser with notice,⁴ as he is when the trust appears as a matter of record in

1. *Le Neve v. Le Neve*, 2 White & T. Lead. Cas. Eq. 35; *Ten Eyck v. Witbeck*, 135 N. Y. 40. See, also, cases in notes following under this section.

2. N. Y. Real Prop. Law, § 95, provides that an implied or resulting trust shall not be alleged or established to defeat or prejudice the title of a purchaser for a valuable consideration without notice of the trust. § 105 provides that if the trust (express) "is expressed in the instrument creating the estate, every sale,

conveyance or other act of the trustee in contravention of the trust, except as provided in this section, shall be absolutely void."

3. *Le Neve v. Le Neve*, 2 Lead. Cas. Eq. 35, notes; *Denton v. Ont. Co. Nat. Bank*, 150 N. Y. 126.

4. *Ten Eyck v. Witbeck*, 135 N. Y. 40; *Anderson v. Blood*, 152 N. Y. 285; *Cornell v. Maltby*, 165 N. Y. 557; *Westinghouse v. Ger. Nat. Bk.*, 188 Pa. St. 630; *Swasey v. Emerson*, 168 Mass. 118; *Macon v. Mullaby*, 145 Ill. 383.

the title to the land involved,⁵ and he takes as trustee, subject to the terms of the trust. To be a purchaser for value he must have actually parted with something of value before receiving notice of the trust. A merely nominal consideration is not enough, since if no more is paid the transaction is essentially a gift, and equity looks to the real nature of the transaction, not its mere form.⁶ A conveyance made in satisfaction of an existing indebtedness is not value, since the purchaser is in no way harmed, the indebtedness remaining unaffected after discovery of the fact that the grantor had no beneficial interest to concey.⁷ Decisions to the contrary in some states are clearly contrary to the principle on which this doctrine depends.⁸ Blood relationship or relationship of marriage is not value within the meaning of this rule.

§ 204. Further Incidents of Trusts.—It follows from what has been said that the trustee may convey the legal title, except where statutes forbid it, or make the conveyance void, as in New York and a few states heretofore referred to, the grantee taking subject to the trust except where he is a purchaser for value without notice thereof, and except where the conveyance is made in due performance of the trust. The trustee may devise the legal estate, and it will

5. *Carpenter v. Dexter*, 75 U. S. 513, 532; *Tucker v. Shaw*, 158 Ill. 326.

6. *Ten Eyck v. Witbeck*, 135 N. Y. 40 (ten dollars actually paid not value within this rule; must be fair equivalent for property purchased).

7. *Rodgers v. Bonner*, 45 N. Y. 379; *Amer. Sugar R. Co. v. Francher*, 145 N. Y. 552; *Schloss v. Feltus*, 103 Mich. 525.

8. *Bughman v. Central Bk.*, 159 Pa. St. 94; *Nat. Revere Bk. v. Morse*, 163 Mass. 383.

The conveyance must have been made and delivered and the consideration wholly paid before receiving notice in order that the grantee take free of the trust. If only part of the consideration is paid before notice he has an equitable lien on the property to that amount which is superior to the trust or other equity, but he is not a purchaser for value without notice. *Murray v. Ballou*, 1 Johns. Ch. (N. Y.) 566; *Hangwout v. Murphy*, 21 N. J. Eq. 118; *Weaver v. Barden*, 49 N. Y. 286.

pass to his heirs if he die intestate, the devisee or heirs taking subject to the trust.¹ In New York and a few other states statutes provide that on the death of the trustee the trust vests in the court which will appoint a new trustee on motion made by any of the parties interested on notice to the others.² The interest of the *cestui* may, of course, always be transferred by him, except where such alienation is prevented by some valid provision of the trust,³ or by statute as in New York and some other states where the interest of the beneficiaries of a trust to collect and apply the rents and profits cannot be transferred.⁴

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| 1. 1 Perry, Trusts, §§ 334-340; 1 Ames Cas. Trusts, 345; Jackson v. Delancy, 13 Johns. (N. Y.) 537; Zabriskie v. Morris & E. R. Co., 33 N. J. Eq. 22. | 2. N. Y. Real Prop. Law, § 111; 1 Perry, Trusts, § 341.
3. 1 Perry, Trusts, 386a; Lewis v. Hawkins, 23 Wall (U. S.) 119.
4. N. Y. Real Prop. Law, § 103. |
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CHAPTER IX.

JOINT TENANCIES AND TENANCIES IN COMMON.

§ 205. **Nature of Joint Tenancies.**—An estate conveyed or devised to two or more persons, either in fee, in tail, for life or for years, created a joint tenancy at common law, in the absence of words expressing an intent to create a tenancy in common.¹ By statute in most states it is now provided that a tenancy in common will arise in such case, unless expressly declared to be a joint tenancy.² The essence of a joint tenancy is that the joint tenants take and hold as though they together constituted one person. Under the feudal system they held jointly by a single holding or tenure from the overlord, and in the absence of express words to the contrary a conveyance to two or more persons was presumed to be in joint tenancy, it being the presumed intent that they should hold a single estate by a single tenure as though they were together only one person in so far as their relation with the overlord was concerned. The four unities of (1) time—that they acquire their interests at the same moment, (2) title—that they acquire their interests by the same deed or will, (3) interest—that each have an interest indetical with the interest of each of the other cotenants, and (4) possession—that they each be entitled

1. 2 Bl. Com. 180; Williams R. P. (17th ed.), 164. See, also, cases in notes following.

A joint tenancy for life continues until the death of the survivor, the entire property passing to the survivor for his life, on the death of the other tenant or tenants.

If real property is conveyed or devised to A and B and the heirs of their two bodies, and A and B are persons who may possibly marry, they take an estate in tail special, only children resulting from their in-

termarriage being entitled to inherit on the death of the survivor. But if they are persons who cannot intermarry, as brother and sister, or two males or two females, they take as joint tenants for life, but with separate inheritances, so that on the death of the survivor the heirs of the body of each will receive an undivided one-half in tail. Williams Real Prop. (17th ed.), 164, 165.

2. See note 7 immediately following.

to the common possession of the entire property, grow out of this one essential, the fictitious unity of the tenants, they holding together as though they were one. Since they take as one person they must take at the same instant of time and by the same instrument of title; the title of one must be identical with the title of every other, and must have been acquired at the same moment. Since each tenant has an interest in the property only as a member of this fictitious unity, it follows that his interest must be, and continue to be, identical in every respect with the interest of every cotenant, each as member or part of the unity being the owner of the entire property, with the right to possess and enjoy it all, subject to the right of the cotenants or co-members of the unity to the same ownership, possession and enjoyment. The entire property is owned, possessed and enjoyed by the fictitious person, the unity, of which each tenant is a component part.³ One tenant, therefore, cannot take as life tenant, the other in fee; one cannot have an undivided one-half interest, the other an undivided one-fourth. In fact, if the deed or will creating the estate give them separate and distinct shares or portions, though equal in every respect, they take as tenants in common, the intention being to give them separate and distinct interests as individuals, not as members of a unity.⁴

3. Williams Real Prop. (17th ed.), 164-167; 2 Bl. Com. 180-194.

Exceptions to the requirement of unity of time have been made in the case of estates created by deed under the statute of uses and estates created by will. If the intention is to create a joint estate in the tenants, though some of them are to acquire their interests at a later date than the others, a joint tenancy, nevertheless, arises, the intention of the testator or grantor being given effect in these cases though the parties take at dif-

ferent times. See Williams R. Prop. (17th ed.), 167; Co. Litt. 188a; 2 Bl. Com. 181.

On the necessity of the four unities to joint tenancies see cases hereafter cited in this and the following sections.

4. Shattuck v. Wall, 174 Mass. 167; Stevenson v. Lesley, 70 N. Y. 512, at 515, 516; Hornberger v. Miller, 28 App. Div. (N. Y.) 199, aff. 163 N. Y. 578; Griswold v. Johnson, 5 Conn. 363; Mason v. Method. Epis. Church, 27 N. J. Eq. 47.

The doctrine of survivorship, that on the death of any tenant his interest survives to his cotenants instead of passing to his heirs, is based on the same principle. On the death of a tenant those who survive continue to be this fictitious person who holds the land of the overlord. There is nothing to pass to the heirs or devisees of the deceased tenant, since the property belongs to the unity which continues in the surviving tenants or tenant.⁵ In addition to the four unities as essentials to a joint tenancy it is necessary that it be created by purchase, that is, by deed or will. Where land descends to heirs by inheritance through operation of law and not by action of the owner by deed or will, they take as tenants in common.⁶

It is clear that joint tenancies are of feudal origin, it being to the advantage of the overlord that the joint holding should be a single distinct tenure, continuing in the survivors without the interposition of the heirs of the tenants first dying. Of course this advantage disappeared with feudalism. Under modern statutes a tenancy in common is created unless the grantor or deviser has expressly declared in the deed or will creating the estate that the cotenants shall hold in joint tenancy.⁷

5. Williams Real Prop. (17th ed.), 164-166; 2 Bl. Com. 183; Morris v. McCarty, 158 Mass. 11.

The right of survivorship does not extend to annual crops planted by the deceased tenant and growing in the land or harvested by him, but still on the premises. They are his personal property and pass as such to his personal representatives. Pritchard v. Walker, 22 Ill. App. 286, aff. 121 Ill. 221.

6. 2 Bl. Com. 180; Bassler v. Rewodlinski, 130 Wis. 26; Putney v. Dresser, 2 Metc. (Mass.) 583. In this case the court held that joint adverse possession by two wrongdoers

was a sufficient acquisition of title by purchase to make them joint tenants, in so far as they had title at all.

7. N. Y. Real Prop. L., § 66; Matter of Russell, 168 N. Y. 169; Case v. Owen, 139 Ind. 22; Miller v. Miller, 16 Mass. 58; Morris v. McCarthy, 158 Mass. 11; Berden v. Van Ripen, 16 N. J. Law 7; The Boston Franklinite Co. v. Condit, 19 N. J. Eq. 394; Slater v. Gruger, 165 Ill. 329; Fair v. Grand Lodge, etc., 83 Wis. 446; Allen v. Allen, 114 Wis. 615; Blumenthal Bros. v. Culver, 116 Ia. 326. In Overheiser v. Lackey, 207 N. Y. 229, a devise to two daughters "jointly" was held to create a tenancy in com-

Trustees and executors have always held as joint tenants, title surviving to the survivors or survivor in order that the administration of the trust may go on without interruption or interference on the part of the heirs of any trustee, in case of his death. This has continued to be the law, either by express statutory provision, or by decision, the courts holding that statutes changing joint tenancies into tenancies in common were not intended to affect estates held by trustees as such.⁸

These statutes do not apply to conveyances or devises to husband and wife, and therefore estates in entirety are in no way affected by them.⁹ The statutes generally apply to joint estates already existing at the time of their enactment, as well as to those thereafter created, changing joint tenancies then existing into tenancies in common unless the intent to create a joint tenancy was expressed in the instrument creating the joint estate. The constitutionality of this provision has generally been sustained, on the ground that the change in no way impairs a vested estate, since the estate of the tenant is made more valuable by the change, the interest of a tenant in common being more valuable

mon, the word not having been used in its technical sense.

In some states statutes expressly do away with the incident of survivorship, unless survivorship is expressly reserved in the instrument creating the joint estate. *Redemptorist Fathers v. Lawler*, 205 Pa. St. 24 (Act of Mar. 31, 1812); *Rowland v. Rowland*, 93 N. C. 214 (Act of 1784 applies to joint tenancies in fee, in no way affecting a joint tenancy for life); *Lockhart v. Van Dyke*, 97 Va. 356. See *Phelps v. Jepson*, 1 Root (Conn.) 48 (the court refusing to recognize or apply the doctrine of survivorship).

8. See preceding note, also 4 Kent Com. 361; *Webster v. Van Deventer*,

72 Mass. 428; *Jones v. Cable*, 114 Pa. St. 586; *Saunders v. Schmaelzle*, 49 Cal. 59; *Franklin Sav. Inst. v. People's Sav. Bk.*, 14 R. I. 632.

In *Boston F. Co. v. Condit*, 19 N. J. Eq. 394, the court held, in the absence of a provision in the statute excepting trustees and executors from its operation, that they take as tenants in common under the statute in case there is no express provision in the deed or will that they take as joint tenants.

9. *Chandler v. Cheney*, 37 Ind. 391; *Johnson v. Johnson*, 173 Mo. 91; *Farr v. Grand Lodge, etc.*, 83 Wis. 446; *Price v. Pestka*, 54 App. Div. (N. Y.) 59.

than that of a joint tenant because of its certainty and definiteness.¹⁰ In a few states, however, it has been held that the statute is unconstitutional in so far as it purports to change joint tenancies already existing into tenancies in common.¹¹

The better view is that the statutes apply to transfers of personalty as well as realty, a tenancy in common arising unless expressly made in joint tenancy.¹² In some jurisdictions, however, it is stated that joint tenancies of personal property arise as at common law where all the unities are present, unaffected by the statute.¹³

§ 206. The Individual Interest of Each Joint Tenant.—

The interest of each tenant is his right as a member or part of the unity to occupy and enjoy the property during his life, with the possibility of becoming sole owner by survivorship, subject to a similar right in each of his cotenants. Since his interest ends on his death before the death of the other cotenants, it follows that individually he has no estate of inheritance, nothing passes to his heirs on his death,¹ he has no interest which he can devise by will,² and his wife or widow has no dower right, either inchoate or consummate.³ The incidents of dower and curtesy do not attach to joint tenancies since the individual interest of any joint tenant is not an estate of inheritance.

But the tenant's interest is nevertheless a separate and distinct property right which he holds as an individual

10. *Miller v. Miller*, 16 Mass. 58; *Bambragh v. Bambragh*, 11 Searg. & R. (Pa.) 191. See note 6, *supra*.

11. *Den ex Dem. Berden v. Van Ripen*, 16 N. J. L. 7; *The Boston F. Co. v. Condit*, 19 N. J. Eq. 394; *Greer v. Blauchar*, 40 Cal. 194 (dicta).

12. *Bliven v. Seymour*, 88 N. Y. 469; *Matter of Kimberly*, 150 N. Y. 90.

13. See *Farr v. Grand Lodge, etc.*, 83 Wis. 446 (dicta); *Emerson v. Cutler*, 14 Pick. (Mass.) 108 (semble).

1. *Williams R. Prop.* (17th ed.), 168; 2 Bl. Com. 182; *Babbitt v. Day*, 41 N. J. Eq. 392.

2. See last preceding note, also *Duncan v. Forrer*, 6 Binney (Pa.) 192.

3. *Babbitt v. Day*, 41 N. J. Eq. 392. See, also, note 1, *supra*.

against his cotenants and all the world. This interest he may convey to a stranger or to one or more of his cotenants. As a vested interest in land it may be conveyed, irrespective of the effect of such conveyance on the joint tenancy. This effect is necessarily to destroy the joint tenancy in so far as the interest conveyed is concerned, as the grantee takes this interest at a different time by a different instrument of title, destroying the unities of time and title which, as we have seen, are essential to the existence of the joint tenancy.⁴ The stranger as grantee cannot hold as a member of the fictitious unity without the joint action of all the tenants,⁵ and if the conveyance is made to one of the other tenants he must necessarily hold as tenant in common, since he acquires the additional share by a different conveyance at a different time, and has as a result a greater interest than his cotenants. As far as this share is concerned he is not a member of the unity owning the property by community of interest with the others. If there are three or more joint tenants, and one conveys his interest to a stranger or to one of his cotenants, the two or more remaining tenants will continue to hold their original shares as joint tenants, the unity continuing in them in so far as the unities of time and title have not been broken. Therefore if

4. See note 1, *supra*, and cases cited in notes that follow.

5. In *Colson v. Baker*, 42 Misc. (N. Y.) 407, the court held that a joint tenancy arose where two tenants in common conveyed their interest by joint deed to one of them and a third person, the grantees to hold "as joint tenants and not as tenants in common." The unities are here all present, the interest of the tenant in common being changed into a joint tenancy as effectually as though the conveyance had been through another person. Though he held as tenant in common before, he acquired his new

interest as joint tenant at the same moment that the third person acquired his interest as cotenant, and by the same instrument. The court cites *Murphy v. Whitney*, 145 N. Y. 541, which case held that a parol agreement between tenants in common that they hold as joint tenants, carried out on one side, is valid and will be specifically enforced in accordance with the general rule applying to parol contracts for the conveyance of land, performed in part by one party, justice requiring that they be performed by the other party as well.

A, B, C and D are joint tenants, and A conveys his interest to X, the remaining tenants, B, C and D, will hold as joint tenants subject to survivorship, as to the three-fourths undivided interest remaining with them, the other one-fourth belonging to X as tenant in common. The same result would follow a conveyance by A to B, in which case B would hold a one-fourth interest as tenant in common and a one-fourth interest as joint tenant with C and D, each of whom would also hold their original one-fourth subject to survivorship as between B, C and D.⁶

Since the joint tenancy may be broken up at pleasure by a conveyance by each tenant to a third person, or by separate conveyances to one another, it follows that the same result may be accomplished by mutual deeds among the tenants by which each takes an undivided interest as tenant in common. Such a transaction is a conveyance by the unity to each of the tenants of his undivided portion.⁷

The mortgaging of a joint tenant's interest breaks the unities and converts the interest mortgaged into a tenancy in common exactly as would a conveyance. As far as the legal title is concerned the mortgage is a conveyance, by way of security in equity, and the unities of time and title are broken as soon as the mortgage is delivered.⁸ In some jurisdictions a mortgage is said to create a lien only in favor of the mortgagee, the legal title remaining unaffected. It may be argued, in these states, that the mortgage does not destroy the joint tenancy since the unities are not broken. One of two positions must be taken, either that the mortgage is a mere lien, like a judgment lien, in which case it is subject to be defeated by survivorship in case the mortgagor die before his cotenants, or else the

6. Litt. §§ 292, 294; 2 Bl. Com. 186; (N. Y.) 407, discussed in note 5, Williams R. Prop. (17th ed.), 168, and cases in notes that follow.

7. See preceding notes under this section. See Colson v. Baker, 42 Misc. v. Ammons, 1 Binney, 175.

8. York v. Stone, 1 Salk. 158 (1 Eq. Cas. Abr. 293); Lessee of Simpson

technical legal title passes under a mortgage, the unities are broken, and the joint tenancy is at an end in so far as the interest mortgaged is concerned. The latter view is sound, while the former view is impracticable and illogical. The middle view, taken in one case,⁹ that the mortgage does not destroy the joint tenancy, and that the mortgage, though only a lien, attaches to the interest of the mortgagor after it passes by survivorship to his cotenant, is simply impossible and unthinkable. If the mortgage is a mere lien it attaches to the interest of the tenant mortgagor, and any rights acquired under it can be no greater than those of the tenant who has made the mortgage. Assuming the joint tenancy to continue, the tenant's interest ceases on his death, his cotenants becoming owners by survivorship as the surviving members of the unity. The mortgagee's interest under his mortgage necessarily ends on the death of the tenant mortgagor, assuming the joint tenancy to continue. But assuming such a result to be possible, what becomes of the unity of interest of the tenants? Suppose A and B are joint tenants, A mortgages his interest for nine-tenths of its value. Assuming the joint tenancy as continuing, unaffected by survivorship on the death of A, the situation would be grossly unfair to B, and absolutely hostile to the principle underlying joint tenancies. Before A's death A would have a chance of survivorship to B's unincumbered share, while B's chance of survivorship is worth only one-tenth as much, as he would take A's share encumbered by a mortgage up to nine-tenths of its value. The position taken by this case is unreasonable and unjust, and cannot be supported. It is submitted that in New York and the other states holding that a mortgage creates a lien only the view must be taken that the making and delivery of the mortgage in such case breaks the unities and converts the share mortgaged into a tenancy in common. The effect

9. *Wilkins v. Young*, 144 Ind. 1.

of the mortgage on a technical legal estate is involved here, unaffected by the equitable doctrines which apply to mortgages. In these states the view that the mortgagor remains owner, the mortgagee having the right to enforce the mortgage by way of security only, is the result of the merger of law and equity in the courts, a court of law at trial term being a court of equity for the purpose of applying the equitable doctrine of mortgages above stated wherever and whenever any question involving a mortgage may arise. But the effect on a joint tenancy of the mortgaging of a tenant's interest therein involves no question of equity. A court of equity has nothing to do with it. It is a purely legal question, involving a technical legal estate. A mortgage is now, as it always has been, in form at least, a conveyance of the legal title to the land, with the usual words of conveyance, description of the property, and other parts of the ordinary deed. The net result of applying the rules of law and equity taken together is that the mortgagor remains owner, the mortgagee having a right in the land by way of security only. But in this case where a question of the technical legal title only is involved, the courts are bound to hold, it is submitted, that the mortgage does transfer the technical legal title as it purports to do, the unities are therefore broken, and the joint tenancy is at an end so far as the interest mortgaged is concerned. Why should equity be resorted to for the purpose of preventing a joint tenancy from being converted into a tenancy in common by a breaking of the unities?

This is made clearer by a consideration of the other alternative. If a mortgage in this case is to operate as a mere lien, like a judgment lien, it will be defeated by survivorship in case the tenant mortgagor dies leaving any cotenant surviving. The practical effect would be that joint tenants, though they may convey their interests as they please, could not mortgage them, since no one would ac-

cept such precarious security, dependent as it would be on the mortgagor's surviving his cotenants.¹⁰

The leasing of his interest by a joint tenant for a term of years is a severance during the term only, the parties continuing as joint tenants of the reversion, subject to the term, which is therefore unaffected by survivorship.¹¹

§ 207. Tenants in Common.— A tenant in common has a distinct undivided interest which he may dispose of by deed or will, which descends to his heirs in case of his death intestate, in which his wife or widow is entitled to dower, inchoate or consummate as the case may be, since his interest is an estate of inheritance, and to which curtesy attaches when the tenant is a married woman. The only unity essential to a tenancy in common is the unity of possession, as such tenants may acquire their interests at different times by different instruments of title, and their interests need not be equal. The four unities may all be present in a tenancy in common, and all except the unity of possession may be absent.¹ They *must all* be present in a joint tenancy.

Under the common law a conveyance or devise to two or more persons created a joint tenancy unless the intent to create a tenancy in common was expressed in some form in the instrument creating the estate.² A gift to two or more persons of separate and distinct, though equal, shares created a tenancy in common, the fact that each was given a distinct share indicating an intention that each tenant should take a separate and distinct interest as tenant in common, rather that they should all hold together as one

10. See last two preceding notes.

169; 2 Bl. Com. 190-194; Putnam v.

11. Litt. 304; 2 Bl. Com. 186; Gould v. Kemp, 2 M. & K. 310; Clerk v. Clerk, 2 Vern. 323.

Ritchie, 6 Paige (N. Y.) 390; Chittenden v. Gates, 18 App. Div. (N. Y.) 169.

1. Williams Real Prop. (17th ed.),

2. See § 205, *ante*.

person in joint tenancy.³ For the same reason the conveyance to two or more persons of equal interests by separate simultaneous instruments created a tenancy in common.⁴ As before stated, by statute in most states a conveyance or devise to two or more persons now creates a tenancy in common unless expressly made to them jointly or as joint tenants.⁵

A grant or devise to two or more persons as tenants in common creates equal undivided interests in the tenants in the absence of a provision making their shares unequal.⁶ The incidents of co-ownership as between both tenants in common and joint tenants are discussed hereafter.⁷

§ 208. Estates in Coparceny.—An estate in coparceny arises under the common law in England where in default of male heirs the inheritance passes by descent to two or more female heirs, and where, by local custom, the inheritance descends to two or more male heirs, instead of under the law of primogeniture which generally prevails in England.¹

Estates in coparceny were the only joint estates in which the right of compulsory partition existed without the aid of equity or statutes, and the term "coparceny" or "parceny," as the estate is sometimes called, is said to be derived from that fact.²

3. *Stevenson v. Lesley*, 70 N. Y. 512; *Hornberger v. Miller*, 28 App. Div. 199 (dicta); *Shattuck v. Wall*, 174 Mass. 169; *Mason v. Methodist Epis. Ch.*, 27 N. J. Eq. 47; *Griswold v. Johnson*, 5 Conn. 363.

4. *Howard v. Chase*, 104 Mass. 249; *Welsh v. Sackett*, 12 Wis. 243.

5. See § 205, *ante*.

6. *Baumann v. Guion*, 21 Misc. (N. Y.) 120; *Edwards v. Edwards*, 39 Pa. St. 369; *Campau v. Campau*, 44 Mich. 31.

7. See Ch. XI, *post*.

1. *Williams Real Prop.* (17th ed.), 257, 258; 2 Bl. Com. 187. As to the law of primogeniture in England, see *Williams R. P.*, id. 257; *Digby Hist. L. Real Prop.* (5th ed.), 421; *Owen v. Gibbons*, 1 Ch. 636.

2. *Williams R. P.*, id. 258; *Litt.* § 241; 2 Bl. Com. 189. Partition of these estates is now controlled by statutes governing partition of joint tenancies and tenancies in common, partition having been extended to cover these estates.

As to strangers they hold jointly, so that in any action concerning the entire property so held by them they may sue or be sued jointly.³ Each holds, for every purpose, a distinct and separate interest in no way different from the interest of a tenant in common, which may be conveyed or devised by will, and which will descend to the heirs of the coparcener, entirely free of the incident of survivorship.⁴ In most of the states coparceny does not exist, since the law of primogeniture is not recognized here. Property in this country passing by inheritance to two or more heirs, male or female or both, is held by them as tenants in common.⁵

§ 209. Partnership Estates.—Partnership real property acquired by the firm for firm purposes, is usually held by the partners as tenants in common, they holding as trustees for the firm so far as it is required for partnership purposes.⁶ There is no such thing, therefore, as a partnership estate at law. The firm is not recognized at law as an entity or person distinct from the partners as individuals, and therefore the firm cannot take title to its land in the firm name. A conveyance to the firm as such is a conveyance to those partners as tenants in common whose names appear in the firm name. Equity, however, recognizes the firm as a distinct entity, and whether the legal title be held by all the partners, or by any two or more, or by only one of them, equity implies a trust in favor of the firm, the partner or partners having the legal title being compelled in equity to hold and account for the property as trustees in so far as it is needed for firm purposes.⁷ Therefore while

3. 2 Bl. Com. 188.

4. Litt. 280; 2 Bl. Com. 188, 189, 191.

5. See § 205, *ante*.

6. See cases in notes following.

7. Fairchild v. Fairchild, 64 N. Y. 471; Darrow v. Calkins, 154 N. Y. 503; Buckley v. Doig, 188 N. Y. 238;

Riddle v. Whithill, 135 U. S. 561;

Shearer v. Shearer, 98 Mass. 107;

Galbraith v. Tracy, 153 Ill. 54;

Kruschke v. Stefan, 83 Wis. 373, 385,

386; Foster's App., 74 Pa. St. 391;

Buffum v. Buffum, 49 Me. 108;

Campbell v. Campbell, 30 N. J. Eq.

415.

the firm is a going concern the partners as members of the firm may sell and convey the land without their wives joining, since such sale and conveyance is made by them as trustees for the firm, their separate individual interests being subject to the right of the firm to dispose of the property, and the derivative right of dower of the wife of each of them being subject to the same right. In so far as they hold as trustees their wives have no right of dower, and when, as such trustees they convey the land for the firm, their wives' right of dower is defeated.⁸

When the partnership is dissolved and is in course of dissolution the partners as such trustees must apply the land to the payment of firm debts and to the adjusting of equities between the partners in case there is not sufficient personal property for the purpose. Any parcels of firm lands held by the partners as tenants in common after all such debts are paid and equities settled, belong to them as tenants in common in their own right free of the implied trust, subject to dower, partition, and the other incidents of such estates.⁹ Any balance of the proceeds of parcels sold for the purpose of paying such debts or settling such equities which is not required for those purposes, is regarded as though it were still the land through the sale of which it was secured, and the wife or widow of each partner is entitled to dower in her husband's share of such proceeds.¹⁰

The courts generally apply the doctrine of equitable conversion to all these cases, holding that the realty is converted into personalty to the extent that it is required to settle firm debts and equities between the parties, the partners being compelled to hold the legal title thereto as above stated.¹¹ Necessarily the trust must be implied in any event,

8. *Dawson v. Parsons*, 10 Misc. (N. Y.) 428; *Hauffman v. Hauffman*, 91 App. Div. (N. Y.) 197. See, also, *dicta* in *Greenwood v. Marvin*, 111 N. Y. 423, 436. See, also, *Woodward-Holmes Co. v. Nudd*, 58 Minn. 236.

9. *Woodward-Holmes Co. v. Nudd*, 58 Minn. 236, and cases in note 3, *supra*.

10. See § 102, *ante*.

11. See cases cited in note 3, *supra*.

since the legal title is in the partners as individuals. The application of the doctrine of equitable conversion to these cases, it is submitted, is entirely unnecessary, adds absolutely nothing, is purely artificial, and tends to make the law on the subject more complicated.

When the partners expressly agree, or where such agreement should be inferred from the facts, that whenever the firm is dissolved its real property shall be sold and the proceeds distributed as personalty, the doctrine of equitable conversion properly applies. Equity regarding that as done which ought to be done, treats the land as converted into personal property for all purposes as between the partners and those claiming through them, so that on the dissolution of the firm its real property is treated and administered exactly as is its personalty, is sold and the proceeds used in paying debts, the balance being distributed among the partners as personalty. As it is personal property by equitable conversion it follows that the wife or widow of each partner has no right of dower therein, nor does the deceased partner's interest descend to his heir.¹² In England such an agreement is implied in all cases, firm real property being treated as personalty for all purposes of distribution, the right of dower never attaching.¹³ In this country this doctrine is followed only in case of an express agreement to that effect, which may be in writing or by parol, incorporated in the original partnership agreement or subsequently made, or in case of such agreement implied in fact.¹⁴ It will be implied where the partnership is organized to buy and sell real estate for profit, it being clear in such case that the parties did not intend in any sense to become landed proprietors individually, the land being purchased in the regular course of the firm's business for the express purpose of selling it at a profit.¹⁵

12. *Buckly v. Doig*, 188 N. Y. 238; *Eng. Partnership Law*, 53 & 54 Vict. ch. 39, §§ 20-23.
13. *Darrow v. Calkins*, 154 N. Y. 503.

14. See note 8, *supra*.

15. *Buckly v. Doig*, 188 N. Y. 238.

CHAPTER X.

ESTATES IN ENTIRETY.

§ 210. **Nature of Estates in Entirety.**—A conveyance or devise of real property to two persons who are married to each other at the time of the conveyance creates an estate in entirety. The conveyance is to the unity of husband and wife. They hold as one person, each being entitled to the equal enjoyment and possession of the property with the other as a member of the unity.¹ The four unities of time, title, interest and possession must be present, as in the case of a joint tenancy, and in both classes of estates they must take by purchase, viz.: by deed or will, and not by inheritance.² The right of survivorship exists between them, since the estate belongs to the unity, and therefore continues in the survivor as the surviving member of the unity.³ These estates differ from joint tenancies in that the right of survivorship cannot be defeated by any conveyance which either party may make. The reason for this rule is that neither party has an interest that can be conveyed. The estate is held by the legal unity absolutely, and therefore neither party has any individual interest other than the right to a share in the possession and the rents and profits. If the husband conveys or mortgages his interest it will be valid only as covering his share of

1. Co. Litt. 187b; *Miner v. Brown*, 133 N. Y. 308; *Buttler v. Rosenblath*, 42 N. J. Eq. 651, and cases in notes following.

2. *Knapp v. Windsor*, 60 Mass. 156, expressing the general rule, recognized expressly or impliedly in the cases cited under this and the following section.

In Pennsylvania, following the prin-

ciple that any estate held by husband and wife together must be held by the entirety, it was held that where the parents inherited land from a deceased child they took by the entirety. *Hilliam's Exrs. v. Dixon*, 65 Pa. St. 395.

3. See cases in last two notes and in notes following under this and the following section.

the rents and profits during the joint lives of himself and his wife. If the husband die first his deed or mortgage is void as against the wife, who becomes sole owner by survivorship. But if the husband survives he is estopped from denying the validity of the deed or mortgage as against his grantee or mortgagee who has paid him for the property, or has loaned him money on the land as security, and the deed or mortgage becomes good and enforceable by estoppel against the entire property, not merely against an undivided one-half interest therein.⁴

If the land be conveyed to two persons who are about to marry, though the deed expressly provide that they hold as tenants in entirety, they cannot so hold, but take as tenants in common or joint tenants; the existence of the marital relation at the time of the delivery of the deed is essential, the conveyance being to the unity in all cases of these estates.⁵ A conveyance or devise made to husband and wife expressly as tenants in common or joint tenants is valid, and they take as so provided. Though the law declares that husband and wife are one, their unity exists for certain well defined purposes, in no way preventing the wife from owning property in her own right.

4. 2 Bl. Com. 182; *Hiles v. Fisher*, 144 N. Y. 306; *Buttler v. Rosenblath*, 42 N. J. Eq. 651; *Wyckoff v. Gardner*, 20 N. J. L. 556; *Pray v. Stebbins*, 141 Mass. 219; *Chandler v. Cheney*, 37 Ind. 391; *Shinn v. Shinn*, 42 Kan. 1.

In Pennsylvania it is held that the purchaser of the husband's interest is not entitled to the possession during the life of the wife, the income or present enjoyment being held by the entirety in that state, contrary to the general rule under the Married Women's Acts. *McCurdy v. Canning*, 64 Pa. St. 39.

5. Co. Litt 187b; *Morris v. Mc-*

Carty, 158 Mass. 11 (could not take as tenants in entirety since the marriage between them was void; they took as joint tenants, the intent that they should hold jointly being expressed); *Messing v. Messing*, 64 App. Div. (N. Y.) 125; *Hardenberg v. Hardenberg*, 10 N. J. L. 42. In *Banzer v. Banzer*, 10 Misc. (N. Y.) 24, the court held that a conveyance to the wife by a cotenant of the husband made the wife tenant in common with her husband, not tenant by the entirety, since the conveyance was not to the unity.

6. *McDermott v. French*, 15 N. J.

Therefore she may hold an undivided interest in land as tenant in common or joint tenant with her husband.⁶

Where land is conveyed to husband and wife and to others, the husband and wife together count as only one person and receive only one share or portion, which they hold as between themselves as tenants in entirety. Thus if lands be conveyed or devised to A, B, C and D, and A and B are husband and wife, they will together receive one-third as tenants in entirety between themselves, but together holding as a tenant in common with C and D, who each receive one-third.⁷ Of course if it appear affirmatively in the deed or will that the husband and wife are to take as tenants in common or joint tenants, not only with the others but also as between themselves, each will

Eq. 78; *Fulper v. Fulper*, 54 N. J. Eq. 431; *Hiles v. Fisher*, 144 N. Y. 313 (dicta); *Jooss v. Fay*, 129 N. Y. 17; *Miner v. Brown*, 133 N. Y. 312 (here the court, by a strained construction, found that a tenancy in common was intended in order to avoid holding that the entire interest in the rents and profits passed on an execution sale to satisfy a debt of the husband. This was unnecessary, as only the husband's share of the rents and profits would pass in any event under the sale, subject to the wife's right of survivorship, leaving the wife's interest entirely unaffected); *Thorn-ton v. Wiggins*, 135 Ind. 178; *Wilkins v. Young*, 144 Ind. 1.

In *Young's Estate*, 166 Pa. St. 645, the court reaffirms the doctrine that husband and wife cannot hold as tenants in common or joint tenants, even though the deed or will expressly so provides, as laid down in *Stuckey v. Keefe's Exr's*, 26 Pa. St. 397, and again reaffirmed in *Hetzel v. Lincoln*, 216 Pa. St. 60. That these

cases are not sound law seems clear, the court having lost sight of the fact that husband and wife must hold as tenants in common or joint tenants if they held as such tenants before their marriage, and that the estate in entirety depends on the intent to convey or devise to the unity, which intent is absent in the above cases, a contrary intent being expressed.

In *Haak Lumber Co. v. Crothers*, 146 Mich. 575, where the wife joined with her husband in a deed of his individual property given to secure a loan only, and on repayment of the loan the land was conveyed back to husband and wife, no estate in entirety was created, the intent of the reconveyance being to discharge the mortgage only, the first deed having in equity the force and effect of a mortgage.

7. *Jupp v. Buckwell*, 39 Ch. Div. 148; *Barber v. Harris*, 15 Wend. (N. Y.) 615; *Hardenberg v. Hardenberg*, 10 N. J. Law 42.

take a full portion in accordance with the expressed intent.⁸

§ 211. Effect of Statutes on Estate in Entirety.—The statutes enacted in the different states that a conveyance or devise to two or more persons creates a tenancy in common unless expressly made in joint tenancy do not apply to conveyances to husband and wife, and therefore do not affect estates in entirety. The conveyance or devise to husband and wife is to the unity, not to them as individuals.¹

8. The rule that they take as one person is a mere rule of construction with very little in its favor, and supported in this country by very slender authority. The more reasonable construction of such a grant or devise would seem to be that the parties were intended to take in equal shares, the fact of marriage between two of them making no difference. The fiction of the unity of husband and wife existed even under the old common law for certain well defined purposes only, and outside of those purposes it had no existence, the parties being recognized as in fact two persons. This fiction for the most part has disappeared, and it seems quite absurd for courts to hold as a matter of law that a testator or grantor in the case referred to intended to treat the husband and wife as only one person, they to take between them only one share, in the absence of an express provision to that effect in the deed or will. That this is a mere rule of construction, see *In re March*, 27 Ch. Div. 166, and *Jupp v. Buckwell*, 39 Ch. Div. 148, the latter case, however, confirming the old rule as law at the present time in spite of the Married Woman's Acts.

In some states it is held that an

estate in entirety does not arise out of a transfer of personalty to husband and wife, they taking personalty as separate individuals and therefore as tenants in common. *Matter of Albrecht*, 136 N. Y. 91; *Baumann v. Guion*, 21 Misc. (N. Y.) 120; *Wait v. Bovee*, 35 Mich. 425. *Contra*, *Bramberry's Est.*, 156 Pa. St. 628; *Johnstone v. Johnstone*, 173 Mo. 91.

1. *Hardenberg v. Hardenberg*, 10 N. J. L. 42; *Diver v. Diver*, 56 Pa. St. 106; *Hills v. Fisher*, 144 N. Y. 306.

In Massachusetts and several other states husband and wife take as tenants in common by the express terms of the statute unless the deed or will provide that they take by the entirety or as joint tenants. *Mass. Rev. L. Ch. 134, § 6* (L. 1885, c. 237); *Pease v. Inhabitants of Whitman*, 182 Mass. 363; *Pray v. Stebbins*, 141 Mass. 219; *Wilson v. Wilson*, 43 Minn. 398; *Hoffman v. Stigers*, 28 Ia. 302 (in last two cases statute in the usual form was held to apply to estates in entirety, changing them to tenancies in common unless expressly created in entirety); *McNeely v. South Pa. Oil Co.*, 52 W. Va. 616 (survivorship done away with and therefore husband and wife hold as tenants in common in all cases).

The Married Woman's Property Acts, enacted in the different states, which give to married women control over their individual property as though unmarried, were not intended to change the nature or character of estates held by married women. The purpose of these statutes is to take away from the husband the estate by the marital right given him by the law in all of his wife's property, by virtue of which he was entitled to the rents, profits, possession and enjoyment of all her real property during their joint lives, whether owned by her outright, or as tenant in common or joint tenant, or as tenant in entirety. The husband's common law right to the entire income from land held by them as tenants in entirety, therefore, was an incident of the estate by the marital right, the same right extending to all estates in land of which the wife was the owner, and was in no sense an incident of estates in entirety. The only effect of these statutes upon estates in entirety, therefore, is to give to the wife her one-half of the rents and profits, the husband being now limited to his one-half interest therein. Each may convey this one-half interest in the rents and profits for their joint lives. Therefore a deed of the husband conveying his interest in property held in entirety transfers to the grantee the husband's share of the rents and profits during the joint lives of husband and wife. As explained in the preceding section, such a conveyance or a mortgage of the husband's interest operates by estoppel in case the husband survives the wife, giving the grantee or purchaser on foreclosure of the mortgage the entire property, not an undivided one-half share, and of course the same results would follow a conveyance or mortgage made by the wife of her interest.²

2. *Buttler v. Rosenblath*, 42 N. J. Eq. 651; *Hiles v. Fisher*, 144 N. Y. 306; *Pierce v. Chace*, 108 Mass. 258, *McCurdy v. Canning*, 64 Pa. St. 39 (holding that not even an undivided interest in the rents and profits can

be sold by the husband, or on execution for his debts). See note 4 under preceding section.

In some states the Married Woman's Acts have been construed as destroying estates in entirety, the

Since neither husband nor wife has any interest, other than this one-half share of the rents and profits, that can be conveyed, it follows that their creditors cannot sell the interest of either one on execution to satisfy their individual debts.³ The right of each in the rents and profits may be conveyed, and therefore may be sold on execution in behalf of creditors.⁴ The purchaser of a one-half interest in the rents and profits becomes entitled to the common possession and enjoyment of the property and of the rents and profits, exactly as though he were tenant in common with the other tenant, his interest, however, coming to an end on the death of the tenant whose interest he had purchased, being defeated by the right of survivorship of the other tenant.⁵

§ 212. Termination of the Estate.— Partition will not lie between tenants in entirety.⁶ Under the modern statutes they may divide the property by mutual deeds, and in any event partition by deed could be accomplished by conveyance to a third person and reconveyance in portions back to the husband and wife as individuals. The entire fee may be conveyed by their joining in a conveyance to a third person, since the unity in such case conveys the property. Under the modern statutes which enable a married

parties holding as tenants in common. *Cooper v. Cooper*, 76 Ill. 57 (holding that the reason for the rule that they take by the entirety ceased on the taking effect of the Married Woman's Acts); *Robinson's Appeal*, 88 Me. 17; *Clark v. Clark*, 56 N. H. 105; *Donegan v. Donegan*, 103 Ala. 488 (dicta, as a divorce was subsequently secured); *Bassler v. Rewodlinski*, 130 Wis. 26 (Stat. of 1878 abolished estates in entirety, parties taking as joint tenants--wife could not defeat survivorship by devise).

3. *Shinn v. Shinn*, 42 Kan. 1; *Chandler v. Cheeny*, 37 Ind. 391.

4. *Miner v. Brown*, 133 N. Y. 312. See, also, cases in note 2, *supra*, also note 4 under preceding section.

5. *Hiles v. Fisher*, 144 N. Y. 313; *Ketcham v. Walsworth*, 5 Wis. 95, and cases in note 2, *supra*.

6. *Chandler v. Cheney*, 37 Ind. 391 (dicta); *Ketcham v. Walsworth*, 5 Wis. 95; N. Y. Stat. L. 1896, ch. 272, § 26, permits voluntary partition, but not by action.

woman to convey or receive conveyances of land as though unmarried, mutual deeds of partition are valid, the unity conveying to each a definite portion of the property by metes and bounds.

Divorce terminates the estate, since the continued existence of the unity, and therefore of the marital relation, is essential to the continued existence of an estate in entirety. The parties thereafter hold as tenants in common under statutes providing that a tenancy in common arises unless an estate in joint tenancy be expressly created.⁷

7. *Stelz v. Shreck*, 128 N. Y. 263; *Harrer v. Wallner*, 80 Ill. 197; *Enyeart v. Keppler*, 118 Ind. 34 (36) (dicta); *Donegan v. Donegan*, 103 Ala. 488.

In a few states it is held that the tenancy by the entirety continues after the divorce. *Alles v. Lyon*, 216 Pa. St. 604; *Lewis' App.*, 85 Mich. 340.

CHAPTER XI.

INCIDENTS OF CO-OWNERSHIP.

§ 213. **Conveyances by Metes and Bounds.**—The nature of a joint tenancy or tenancy in common makes it impossible for any tenant to convey or mortgage his interest in any specific part of the land held jointly or in common. If each tenant were permitted to divide up the common property in tracts as he pleased, conveying or mortgaging his interest in each tract to different persons, the result would be utter confusion. Thus A and B, holding as tenants in common or joint tenants, might each decide to divide the land in different parcels, the lines of division made by A and those made by B coinciding at no point. If A should then convey his interest in each subdivision as laid out by him, and B should in the same way convey his interest in the entirety different subdivisions to different persons, the confusion resulting in the interests of the purchasers from A and B may be better imagined than described. Though only a single division is sought to be made by A, no division being contemplated by B, the rights of B would be violated, since he should not be compelled to accept a portion of each of the parcels resulting from A's division in a partition of the property, which would be necessary if A's conveyance be given effect against him. It is contrary to the nature of the tenancy that one tenant be compelled to accept two or more physically unconnected parcels in the final partition of the land. Therefore any such conveyance or mortgage is void in every respect except as it may be rendered valid in equity against the grantor or mortgagor by estoppel.¹

1. *Bartlett v. Harlow*, 12 Mass. 348 (in which case a sale under execution of the tenant's interest in a part only of the 60 acre tract held in

common was declared void, the court stating (dicta) that if on partition this portion should be set off to the tenant the sale under execution would

The same principle applies to several cotenants taking by inheritance or grant several distinct parcels of land which they hold jointly or in common. Since in an action of partition one lot may be assigned to one in severalty, and another lot to another, each tenant cannot interfere with this possible right by selling his interest in any one parcel to a stranger.²

In equity, however, such a deed or mortgage is good by estoppel against the tenant who executed it. Therefore in an action of partition the part so conveyed will be set off to the tenant who made the conveyance if this can be done without in any way prejudicing the rights of his cotenant or cotenants.³ Whenever as a result of partition the part so conveyed or mortgaged, or sold under execution, is allotted to this tenant, the purchaser's or mortgagee's title is good by estoppel, the tenant being estopped from denying the validity of the deed or mortgage, he having received the purchase price, or the loan for which the mortgage was given as security.⁴

be good by estoppel exactly as in the case of a voluntary conveyance by the tenant); *Varnum v. Abbott*, 12 Mass. 474 (the court holding that a sale under execution on a judgment worked an estoppel as suggested by the dicta in the preceding case). See, also, cases in notes following, also *Tainter v. Cole*, 120 Mass. 162, holding that a lease made by one tenant in common was void as to the others.

2. *Barnes v. Lynch*, 151 Mass. 510. In *Markoe v. Wakeman*, 107 Ill. 251, while deciding that a conveyance of his interest in a part of a single tract by one tenant in common was void as to his cotenant, contains dicta to the effect that a conveyance of the tenant's interest in the entire parcel would be good for all purposes, though they hold other parcels as tenants in common.

The free alienation of the tenant's interest in a distinct parcel of land should not be interfered with unless it would result, in the particular case, in depriving the other tenant of a substantial right in partition, and therefore if a fair partition may be made without injustice to such other tenant in any other way than by assigning him the entire parcel in question, the conveyance of the tenant's interest therein should be sustained, there being nothing in the nature of co-ownership of the parcel, other than this possible right in partition, which would be inconsistent with such conveyance.

3. *Emeric v. Alvarado*, 90 Cal. 444, and cases in following note.

4. *Varnum v. Abbott*, 12 Mass. 474; *Holcomb v. Coryell*, 11 N. J. Eq. 548; *Emeric v. Alvarado*, 90 Cal. 444. In

For like reasons one cotenant cannot create an easement which will bind the other cotenants, either by grant or by such use of adjoining property belonging to him in severalty as would be sufficient as against a stranger to create an easement by prescription.⁵

§ 214. Ouster of One Cotenant by Another.—An ouster takes place where one or more of the tenants either forces another cotenant out of the possession of the whole or any substantial part of the premises held by them jointly, or prevents him from entering and enjoying the possession, the right to which is common to all. The ouster may be accomplished by forceful means or indirectly by so using the premises as to prevent such common enjoyment and possession.¹ The tenant ousted may maintain ejectment against the tenant or tenants who ousted him, the result of the action if he succeeds being a judgment restoring him to the possession in common with the others, not in an actual ejectment of the defendants.² They are ejected only in the sense that they are forced to give up the exclusive possession by receiving the plaintiff and admitting him to the possession in common with themselves. Such an ouster amounts also to a technical trespass upon the ousted ten-

Crook v. Van Devoort, 13 Neb. 505, the purchaser of a cotenant's interest in part of the land held in common was permitted to maintain ejectment against a mere disseisor, the recovery inuring to the benefit of all the tenants in common, recognizing the purchaser's title as valid against all but the other tenants.

5. *Palmer v. Palmer*, 150 N. Y. 139; *Crippen v. Morss*, 49 N. Y. 63; *Benjamin v. Am. Tel. & Teleg. Co.*, 196 Mass. 454; *Holcomb v. Coryell*, 11 N. J. Eq. 548.

1. *Trustees, etc. v. Johnson*, 66 Barb. (N. Y.) 119; *Zapp v. Miller*, 109

N. Y. 51, 57; *Stevens v. Wait*, 112 Ill. 544, and cases in notes following.

It is submitted that the exclusive occupation of part of the premises refusing to permit the cotenant to occupy that part will not amount to an ouster where the reasonable enjoyment of the premises by both tenants requires that each have exclusive possession of a part. For example, sleeping rooms in a dwelling owned and occupied by tenants in common.

2. See cases in preceding note, also *Clay v. Field*, 115 U. S. 260; *Carpenter v. Thayer*, 15 Vt. 552, and cases in following notes under this section.

ant's interest, and trespass will also lie on his part against them. If they are tenants in common of a mere incorporeal right, as a right of fishery, trespass will not lie since no corporeal interest is involved, but an action of trespass on the case will lie, as where an incorporeal property right is violated by a stranger.³ In the action of trespass the tenant can recover for the ouster only, not for the continued exclusive possession wrongfully maintained by the tenant or tenants guilty of the ouster. An action for mesne profits, the technical action brought against any disseisor in wrongful adverse possession, is the proper action for the ousted tenant to bring in order to recover damages for the wrongful exclusive possession maintained by the cotenant or cotenants in violation of his right.⁴ At common law it was necessary that this action be preceded by a successful ejectment suit, or the recovery in some other lawful way of the common possession, but now in New York and most states the recovery of mesne profits, or an accounting for the wrongful exclusive occupation, may be had in the ejectment suit, thus dispensing with the need of another action after the conclusion of the suit in ejectment.⁵

If an ouster is committed, so that ejectment may be maintained, the tenant who committed the ouster is in adverse possession as against the tenant ousted, provided it be proved that such tenant had notice thereof, and if continued for the period provided by the Statute of Limitations as

3. *Duncan v. Sylvester*, 24 Me. 482.

The destruction of the thing owned in common, as a tree on a boundary line, gives rise to an action of trespass for the damage done to the plaintiff's interest. *Dubois v. Beaver*, 25 N. Y. 123.

4. *Fenton v. Miller*, 116 Mich. 45; *Izard v. Bodine*, 11 N. J. Eq. 403; *Zapp v. Miller*, 109 N. Y. 51; *Badger v. Holmes*, 70 Mass. 118.

In New Jersey the view is taken

that a tenant who makes exclusive use of the lands must account for his cotenant's just share of the profits therefrom, though there be no ouster. He is not, however, required to account for the sole possession of a house held in common, in the absence of proof of ouster. *Bucklelew v. Snedeker*, 27 N. J. Eq. 82; *Edsall v. Merrill*, 37 N. J. Eq. 114.

5. *Clay v. Field*, 115 U. S. 260; *Zapp v. Miller*, 109 N. Y. 51.

applied to actions in ejectment, usually 20 years, he becomes sole owner, the cotenant's right in ejectment being barred by the statute.⁶ Mere exclusive possession and the receipt of all the rents and profits is not adverse possession, as in the case of such holding by a disseisor against an owner in severalty.⁷ At most it is evidence of an ouster and consequent adverse possession, insufficient without proof of some positive act of exclusive ownership in denial of the cotenant's right, of which the cotenant has notice, express or implied.⁸ The presumption is that the tenant occupies of his own right and not adversely to his cotenant. A conveyance by a cotenant which purports to convey the property in severalty, followed by possession by the grantee, is an ouster, and the grantee is in adverse possession to the other tenant. Such a conveyance without change of possession is not enough to create adverse possession.⁹

6. *Millard v. McMillin*, 68 N. Y. 345; *Donason v. Barbero*, 230 Ill. 138; *Stevens v. Wait*, 112 Ill. 544; *Ingalls v. Newhall*, 139 Mass. 268; *Susq. & W. V. R. etc. Co. v. Quick*, 61 Pa. St. 328; *Unger v. Mooney*, 63 Cal. 586; *Kellmer v. Wuchner*, 74 Ia. 359.

7. *Co. Litt.* 199b; 4 *Kent Com.* 370; *Ingalls v. Newhall*, 139 Mass. 268; *Van Bibber v. Ferdinand*, 17 Md. 436; *Wass v. Bucknam*, 38 Me. 356; *Tullock v. Worrall*, 49 Pa. St. 133, and cases in preceding note.

8. Some positive act of hostility to the cotenant's title, notice of which is brought home to him, must be present to make exclusive possession amount to adverse possession. There must be legal ouster with notice thereof brought home to the tenant ousted. *Donason v. Barbero*, 230 Ill. 138; *Loranger v. Carpenter*, 148 Mich. 549 (assertion of title by the

tenant to a stranger not communicated to the cotenant was not admissible to prove ouster); *Culver v. Rhodes*, 87 N. Y. 348; *Tarplee v. Sonn*, 109 App. Div. (N. Y.) 241, and cases in last two preceding notes, and following note.

9. *Unger v. Mooney*, 63 Cal. 586; *King v. Carmichael*, 136 Ind. 20; *Parker v. Proprietors, etc.*, 44 Mass. 91; *Jackson v. Smith*, 13 Johns (N. Y.) 406; *Sanford v. Safford*, 99 Minn. 380.

Of course the forceful putting or keeping of the tenant out of possession, refusing to permit him to occupy and enjoy the property, is the most satisfactory evidence of adverse possession. *Newell v. Woodruff*, 30 Conn. 492; *Siglar v. Van Riper*, 10 Wend. (N. Y.) 414.

As to ouster from part of the premises, see *Carpenter v. Webster*, 27 Cal. 524.

§ 215. Liability of Tenant in Possession to Tenant out of Possession for Rents and Profits, Use and Occupation.—The tenant in sole possession, without denying his cotenant's rights and without excluding him in any way from the common possession and enjoyment of the premises, is not liable to the tenant out of possession for the use and occupation which he has enjoyed, nor is he liable to account for the crops or other benefits derived by him from his own industry in the use and enjoyment of the common property. It is his to occupy and enjoy, as it is his cotenant's, and so long as he is guilty of no ouster of his cotenant he is in no sense a wrongdoer in occupying, using and enjoying his property.¹ Before the Statute of Anne² he was not liable to account to his cotenant for rents collected by him from tenants for years to whom the land may have been let, nor for profits derived from the sale of timber, minerals or other corporeal part of the land itself, but by that statute he is required to account as bailiff for what he has received beyond his share. This statute has been followed by similar statutes in many of the states, and in others it has been recognized as part of the law.³ In England it is strictly construed as applying only to rents received from tenants for years, not to profits derived from the sale of timber, minerals or the like, the sale of which permanently diminishes the value of the freehold.⁴ In this country it is

1. *Le Barron v. Babcock*, 122 N. Y. 153; *Peck v. Carpenter*, 73 Mass. 233; *Badgar v. Holmes*, 70 Mass. 118, and cases cited in notes 4 and 5 following.

2. St. 4 and 5 Anne, ch. 16, § 27, requiring the tenant as bailiff to account to his cotenant or cotenants for their just share and proportion received by him.

3. N. Y. Code Civ. Pro., § 1666; *Gedney v. Gedney*, 160 N. Y. 471, 476; *Joslyn v. Joslyn*, 8 Hun (N. Y.) 338;

Brown v. Wellington, 106 Mass. 318; *Flack v. Gosnell*, 76 Md. 88; *Enterprise Oil & Gas Co. v. Nat. Transit Co.*, 172 Pa. St. 421; *Holmes v. Best*, 58 Vt. 547; 3 *Sharswood & B. Lead. Cas.* 98.

A Pennsylvania statute relates only to accounting by tenants in common of mineral lands as to proceeds of minerals taken from the land. *Fulmer's App.*, 128 Pa. St. 24.

4. *Henderson v. Eason*, 17 Q. B. 701; *Job v. Patton*, L. R. 20 Eq. 84.

generally construed as applying to such profits as well as to rents, such being unquestionably the more liberal and reasonable interpretation of its very meagre provisions.⁵ In this country as well as in England the courts are generally agreed that the statute has no application to crops grown by the labor and industry of the tenant in possession, nor to their proceeds, nor does it render the tenant liable to account for the use and occupation of the premises for residential, business or other purpose.⁶ In several states the tenant out of possession may recover his share of the profits derived by the cotenant from his sole use and enjoyment of the land, though no ouster has occurred, the statute in several cases so expressly providing.⁷

5. See cases cited in note 3, *supra*, also Zapp v. Miller, 109 N. Y. 51; Hayden v. Merrill, 44 Vt. 336; Adams v. Bristol, 126 App. Div. (N. Y.) 660; Everts v. Beach, 31 Mich. 136; Kean v. Connelly, 25 Minn. 222.

In New Jersey, while the tenant is not liable for use and occupation, as the statute is construed in that state (Barrell v. Barrell, 25 N. J. Eq. 173), he is liable for the profits derived from the exclusive working of the land, though there be no ouster. Buckelow v. Snedeker, 27 N. J. Eq. 82; Edsall v. Merrill, 37 N. J. Eq. 114 (dicta, as tenant was compelled to account for the net profits from the mining of mica, in entire accord with the general view).

In Cosgriff v. Dewey, 164 N. Y. 1. and Abbey v. Wheeler, 170 N. Y. 122. the tenant was compelled to account for his cotenant's share of the net profits, in the first case derived from working a quarry, and in the second case from working a mine. Though the court speaks of the tenant's liability as for waste, these decisions were based on the tenant's liability to

account for profits under the statute. In the first case the court said, referring to the stone quarried: "It was not, in any proper sense, the product of the land, but was part of the land itself. It did not represent the use of the land or the rents and profits, but to the extent that it was taken by the defendant operated as a diminution of the estate. If the defendant had taken valuable timber from the land and sold it or converted it into lumber, there is no doubt, we think, that he would be liable to account for its value to his cotenants." That the working of the quarry or mine was not waste is clear. Even a tenant for years would have the right to do so, the property having been appropriated to that use. A tenant in common or joint tenant does not commit waste unless his act constitutes wanton or unreasonable injury inconsistent with the exercise of prudent ownership. See § 218. *post*.

6. See cases in last three notes.

7. Wooley v. Schrader, 116 Ill. 29 (the statute in Illinois so providing);

There is nothing to prevent the tenants from contracting in any way they please concerning the exclusive use of the premises by one of them, and any such contract will be enforced in accordance with the rules of law governing contracts. One tenant may let his interest to his cotenant at a stated rental, the lease determining their rights. But at the end of the term the tenant in exclusive possession under the lease does not render himself liable as a holdover tenant by remaining in possession. His possession at the expiration of the lease is that of cotenant, not of a tenant under a lease wrongfully holding over. As tenant in common or joint tenant he has the right to remain in possession.⁸

Where both tenants are in possession they are co-owners of any crop they may produce, and of any perennial crop, such as hay or fruit, which may be produced on the premises. A tenant in sole possession is exclusively the owner of any annual crop sowed or planted and cared for by him, and of so much of a perennial crop, as of hay, which he has harvested. Hay cut and ready for removal is his, his cotenant having no right to enter and take part of it.⁹

§ 216. Liability Between Cotenants for Services, for Taxes, Interest on Mortgages and Other Carrying Charges, and for Repairs.—In the absence of an express contract to that effect between the parties a tenant in possession can recover nothing for his own services in managing and caring for the common property. As the work is done in taking

Cutler v. Currier, 54 Me. 81 (statute of 1848 changed common law rule and to extent stated modified the English statute); Knowles v. Harris, 5 R. I. 402 (holding that the tenant must pay for exclusive use of the premises for manufacturing purposes one-half the fair rental value). See, also, Ward v. Ward's Heirs, 40 W. Va. 611; West v. Weyer, 46 Oh. St. 66; White v. Stewart, 76 Va. 546; McPherson v.

McPherson, 33 N. C. 391. There would seem to be little reason and less justice in requiring a tenant to account for the results of his use of his own property enjoyed without injury or wrong to his cotenant.

8. Dresser v. Dresser, 40 Barb. (N. Y.) 624; McKay v. Mumford, 10 Wend. (N. Y.) 351.

9. Le Barron v. Babcock, 122 N. Y. 153.

care of his own property, he is held to have acted for himself, and therefore there is no basis for a quasi-contractual obligation on the part of the other tenant or tenants to pay for such services.¹

Taxes, interest on a mortgage to which the joint estate is subject, and other carrying charges, which must be paid to prevent sale for taxes or under foreclosure, fall upon each tenant in proportion to his interest in the property. If one of them pays the entire amount he may compel the others to contribute their shares by an action in equity for contribution, based on the maxim that equality is equity. The same duty to pay such charges is imposed on all, and therefore it is equitable that if one pays the entire amount, the others contribute their proportionate shares.² Where one tenant pays off a mortgage or other encumbrance which has fallen due he is subrogated to the position of the mortgagee or other encumbrancer, and may enforce contribution by enforcing the encumbrance against the cotenant's interest in the property.³

This doctrine of contribution has not been extended to cover the cost of necessary repairs made by one of the tenants as against the others. Under the ancient common law if a house or a mill held by tenants in common or joint tenants became out of repair, one of them could compel the others to join in the making of necessary repairs by means of the old writ *de reparatione facienda*, the court determining what repairs were required, and directing and superintending their making. By order of the court the tenants were compelled to join in the making of the repairs. There

1. Myers v. Bolton, 157 N. Y. 393.

2. Eads v. Rutherford, 114 Ind. 273; Campbell v. Meiser, 4 Johns. (N. Y.) 337; Clark v. Lindsey, 47 Oh. St. 437; Stewart v. Stewart, 90 Wis. 516; Dewing v. Dewing, 165 Mass. 230; Chickering v. Faill, 38 Ill. 342; Wal-kins v. Eaton, 30 Me. 529.

3. Sawyer v. Lyon, 10 Johns. (N. Y.) 32; Cornell v. Prescott, 2 Barb. (N. Y.) 16; Dickinson v. Williams, 11 Cush. (Mass.) 258 (holding that assumpsit will lie to recover a share of amount paid in clearing off common encumbrance); Titsworth v. Stout, 49 Ill. 78.

was nothing under the old law by which a tenant could make the repairs himself and thereafter compel his cotenants to contribute toward their cost.⁴ There are dicta in several cases that an action on the case or in implied assumpsit will lie against a cotenant after the repairs are made, provided a request to join in their making and a refusal to do so are proved against the defendant cotenant, such action being regarded as a substitute for the old writ above referred to, which has admittedly become obsolete.⁵ The better view, however, is that no such action will lie in the absence of express contract.⁶ Such expenditures, like

4. Co. Litt. 200b, 54b; Bowles Case, 11 Co. 82; Calvert v. Aldrich, 99 Mass. 74.

5. Doane v. Badger, 12 Mass. 65; Mumford v. Brown, 6 Cowen (N. Y.) 475; Taylor v. Baldwin, 10 Barb. (N. Y.) 58; Denman v. Prince, 40 Barb. 213 (in last two cases cotenants had expressly contracted to share the repairs. Such a contract runs with the land so as to bind grantees of either); Stevens v. Thompson, 17 N. H. 103 (the court considers it very doubtful as to whether such action would lie); Farrand v. Gleason, 56 Vt. 633 (express agreement here); Fowler v. Fowler, 50 Conn. 256; Beaty v. Bordwell, 91 Pa. St. 438; Ward v. Ward's Heirs, 40 W. Va. 611.

6. Calvert v. Aldrich, 99 Mass. 74, the court saying, "The difficulty in the way of awarding damages in favor of one tenant in common against his cotenant for neglecting to repair is, that both parties are equally bound to make the repairs, and neither is more in default than the other for a failure to do so. * * * Between tenants in common partition is the natural and usually the adequate remedy in every case of con-

troversy. This is the probable explanation of the few authorities in the books, and of the obscurity in which we have found the whole subject involved."

The dicta contained in the cases in the preceding note are in each case a statement that an action in assumpsit or on the case might lie as a substitute for the old writ of the common law, provided notice to join in the making of the repairs was first given to the cotenant. As pointed out in Calvert v. Aldrich, *supra*, the old writ provided for a hearing first as to whether the repairs were necessary or not, and if found necessary they were ordered by the court, and were made subject to the court's supervision and control. This writ, little used and finally becoming obsolete, in no way provided for the recovery of damages for failure to repair, or for contribution after repairs were made. The loose and ill-considered dicta of the cases cited may be safely regarded as overthrown by the law as laid down in Calvert v. Aldrich, supported by the sound reasoning of that case.

personal services of the tenant in possession, are incurred in taking care of his own property. One tenant is as much bound to repair as the other. Therefore there is no basis for an action in implied assumpsit, there being no unjust enrichment or other reason for implying a quasi-contractual obligation. It might be urged with some reason that necessary repairs are as essential to the preservation of the property for the benefit of all the tenants as the payment of taxes and interest on a mortgage, and therefore equity should compel contribution for repairs as well as for such charges, but equity has never extended the remedy of contribution beyond cases of common liability for fixed charges about which there is no indefiniteness or uncertainty. It is clear that each case involving contribution for such repairs would involve the question of whether the repairs were necessary or expedient, whether the amount expended was reasonable or unreasonable, and whether in justice and equity a tenant should be compelled against his will to share the expense of repairing property where there may be no compensating advantage to him. Even under the old writ *de reparatione facienda* the remedy was limited to houses and mills, not extending to fences or other erections.⁷ It must be remembered that if tenants in common or joint tenants are hostile to one another it would be practically impossible for the law to so regulate their use and enjoyment of the property in every detail as to do entire justice between them. Their remedy in case they cannot agree is partition which may be had in all cases at any time.⁸

In the action under the statute for an accounting for rents and profits, discussed in the preceding section, the tenant so compelled to account will be allowed to deduct the cost of necessary repairs as an expense required for the maintenance of the property from which the rents and profits

7. *Kidder v. Rixford*, 16 Vt. 169; *Ward v. Ward's Heirs*, 40 W. Va. 611, and cases in note 5, *supra*.

8. *Calvert v. Aldrich*, 99 Mass. 74; see note 6, *supra*, also § 221, *post*, as to partition.

are derived. The action for such accounting is in equity, and the accounting must be made in accordance with justice and equity.⁹ In New York and the other states in which the statute permits an action in assumpsit as well as in account, the recovery will be the same irrespective of the form of the action, the amount recoverable being the plaintiff's share in the net amount of the rents and profits after deducting the cost of necessary repairs and other necessary charges such as payments for taxes and interest on mortgages. In the action of partition any inequalities between the parties growing out of the cost of repairs, taxes and other carrying charges are finally adjusted in the division of the proceeds of sale on partition.¹⁰

§ 217. Improvements.—Where one tenant has expended money for an improvement of the common property under an agreement, express or implied, on the part of the cotenant to share in the cost thereof, the contract is, of course, valid and may be enforced between the parties.¹ But in the absence of contract express or implied a tenant in common or joint tenant can recover nothing from his cotenant for an improvement of the common property either in any form of direct action therefor, or as an allowance in an action of accounting brought by his cotenant for rents and profits.² Such improvements are entirely voluntary, not necessary to the preservation of the common property, and there is no reason or justice in compelling the cotenant to pay for them against his will. It would be a serious injustice to require

9. *Pickering v. Pickering*, 63 N. H. 468; *Deck's App.*, 57 Pa. St. 467.

10. See §§ 217, 221, *post*.

1. *Taylor v. Baldwin*, 10 Barb. (N. Y.) 58; *Putnam v. Richy*, 6 Paige (N. Y.) 380; *Baird v. Jackson*, 98 Ill. 78; *Reed v. Jones*, 8 Wis. 421 (reprint, p. 216).

2. *Walter v. Greenwood*, 29 Minn.

87; *Louvalle v. Menard*, 6 Ill. 39; *Stevens v. Thompson*, 17 N. H. 103, and cases cited in notes following.

Contra, under special statute in Mass., *Husband v. Aldrich*, 135 Mass. 317, the statute providing for compensation when the tenant has made improvements believing he is owner in severalty.

such payment or allowance out of the rents and profits, since the cotenant might in this way be deprived against his will of much or all the income from the property for years.

In the action of partition, however, the land on which the improvements were made will be set off to the tenant who made the improvements, provided such a division can be made in entire fairness and justice to the other tenant or tenants, each other tenant receiving his full share of the land as though the improvements in question had not been made. In this way the tenant who made the improvements gets them with his share of the land, while the other tenants get all they are fairly entitled to,—their share of the land exclusive of the improvements to the making of which they have not contributed.³

If an actual division cannot be made in this way without injustice to one or more of the cotenants the court will order a sale of the premises and a division of the proceeds, allowing to the tenant who has created improvements on the property the additional amount which the property sells for because of the improvements. It is clear that this additional amount is produced entirely by the improvements to which the other tenant or tenants have contributed nothing. It would, therefore, be extremely inequitable in any case to permit any part of such amount to be distributed among the other tenants, who receive all that they are fairly entitled to on receiving their share of the proceeds of the land without the improvements. Of course the amount allowed the tenant who created the improvements is not their cost; his cotenants cannot be compelled to contribute to the cost of the improvements indirectly in the partition action any more than by a direct action therefor. It is limited to the additional amount which the property brings because of

3. Hall v. Piddock, 21 N. J. Eq. Va. 611; Clapp v. Nichols, 31 App. 311; Green v. Putnam, 1 Barb. (N. Div. (N. Y.) 531. Y.) 500; Ward v. Ward's Heirs, 40 W.

the improvements so made, such amount being determined as a matter of fact in each case.⁴

In New York the law on this subject has been made somewhat uncertain and obscure by the case of *Cosgriff v. Foss*.⁵ In that case the defendant, Dewey, who occupied a trap rock quarry originally as tenant for a term of years, the lease providing that he might remove improvements erected by him at any time during the term, acquired an interest therein as tenant in common, and thereafter he occupied and worked the quarry as tenant in common. He made improvements as such tenant in common which cost \$9,672.40, and which increased the value of the premises. The Court of Appeals held that Dewey should be allowed nothing on account of such improvements, and a judgment directing a sale and distribution without any allowance therefore was affirmed. The court seems to have failed completely to apprehend the principle laid down in the earlier New York cases and in the cases in the other states heretofore cited, deciding that each case must turn on its own facts, and if in view of those facts the court should regard an allowance for improvements as equitable it should be made, otherwise

4. *Hall v. Piddock*, 21 N. J. Eq. 311; *Green v. Putnam*, 1 Barb. (N. Y.) 500; *Fell v. Knapp*, 102 N. Y. 135; *Kelsey's Appeal*, 113 Pa. St. 119; *Fenton v. Miller*, 116 Mich. 45; *Killner v. Wuchner*, 79 Iowa 722; *Martindale v. Alexander*, 26 Ind. 104; *Stewart v. Stewart*, 90 Wis. 516; *Ward v. Ward's Heirs*, 40 W. Va. 611.

In *Fenton v. Miller*, 116 Mich. 45, the court held that if additional rentals are secured because of the improvements which are divided equally among all the tenants, the one who made the improvements should be allowed their actual cost, not their depreciated value at the time of par-

tition. It is clear that if the tenant is allowed only the additional amount which the property brings on partition because of the improvements he should also receive the additional rental which the improvements have produced, or in the alternative, he should be allowed the cost of the improvements as stated in *Fenton v. Miller*.

Under statutes requiring a tenant to account to his cotenants for the exclusive occupation of the premises he will not be compelled to account for the rental value of improvements made by him during such occupation. *Hannah v. Carver*, 121 Ind. 278; *Worthington v. Hiss*, 70 Md. 172.

5. 152 N. Y. 104.

not. No allowance was made to Dewey because he had made the improvements as a business venture, in order to be enabled to take more trap rock from the quarry for his own individual profit, not for the common advantage of his cotenants. The weight of this reason is very much lessened by a later case apparently between the same parties in which Dewey was compelled to account for the trap rock taken by him while tenant in common, the court adding insult to injury by calling it waste.⁶ The case may be distinguished and in a measure supported by the fact, set forth toward the end of the opinion, that it did not appear "unless inferentially, that they (the premises) would sell for any more on account of the improvements." In any event Dewey should not have been allowed the cost of the improvements, but only such part of the proceeds of the sale as would have been derived from the improvements, viz.: the additional amount which the premises would bring because of the improvements. This could not be determined until after the sale. The judgment should have provided that after the sale the referee should determine this amount; subject to confirmation by the court, and that this amount should be deducted *pro rata* from the share of the others and added to his share of the entire proceeds. The judgment should also have provided, in case the other tenants had so requested, that Dewey account for the net amount received by him from the sale of trap rock, after deducting the expenses of operating the quarry, the amount found due to his cotenants to be deducted from his share and added to theirs. It did appear clearly enough, at least inferentially, that the quarry would sell for more because of the improvements, and it is obviously unconscionable that the other cotenants should share in this additional amount, secured entirely by improvements to which they had contributed nothing.⁷

6. *Cosgriff v. Dewey*, 164 N. Y. 1.
See discussion of this case in section following.

7. An examination of the earlier New York cases will show that this case does not establish irreparably

§ 218. Waste Between Cotenants.—We have seen that waste is a permanent injury to the inheritance committed by a tenant for life or for years as against the reversioner

the rule for which it stands, a rule which leaves every such case uncertain until determined by the court of last resort, each case finally turning on whether the highest court will regard it as equitable to make an allowance for improvements, making it impossible for lawyers to advise their clients on the point with any degree of accuracy. In *Green v. Putnam*, 1 Barb. 500, the rule as stated in the text and supported by decisions in England and the other states, is fully and clearly stated and applied, without any suggestion of the limitation of the rule expressed in *Cosgriff v. Foss*. In *Ford v. Knapp*, 102 N. Y. 135, the court said: "If the redeeming creditors (of one of the tenants) get the full one-half of the value of the property as that value exists, unincreased by the improvements, they get every dollar to which they have a just and equitable right. The rule which takes from one cotenant the fruit of his thrift and enterprise and adds it to the unthrift and neglect of the other; which loads upon industry and ability the losses and burdens of idleness or ill fortune; which ties up property from improvement and looks contented upon rot and decay, is a rule which sometimes the rigid and inelastic jurisdiction of a court of law may adopt from necessity, but is without excuse in a court of equity in which this action is pending." *Finch, J.*, at p. 140.

The case of *Scott v. Guernsey*, 48 N. Y. 106, is the basis for the decision in *Cosgriff v. Foss*. There the

remainder in fee, subject to a life estate belonged to several persons as tenants in common. By agreement with the life tenant some of the remaindermen erected improvements during the continuance of the life estate, taking the rents derived therefrom, which at the life tenant's death greatly exceeded the cost of the improvements with interest. The buildings added only a few hundred dollars to the value of the property, they were erected during the continuance of the life estate and before the remainder had vested in possession in the cotenants, and the court was convinced that they were erected without a thought of improving the property for the benefit of all the remaindermen, but solely for the benefit of the cotenants erecting them, and an allowance for their value was not allowed. It is clear that this case presents a very different situation from that which arose in *Cosgriff v. Foss*. Even in this case it is difficult to see why these tenants were not allowed the additional amount the property was worth because of the buildings which they had erected and to which their cotenants had contributed nothing. The only cases where such allowance should not be made is indicated in *Hall v. Pidcock*, 21 N. J. Eq. 311, the court saying "The only good faith required in such improvements is that they should be made honestly for the purpose of improving the property, and not for embarrassing his cotenants, or encumbering their estate, or hindering partition."

or remainderman, that the remedy existed under the ancient common law only in cases of estates in dower, curtesy and chivalry, and that it was extended by the Statutes of Marlbridge and Gloucester to tenancies for life and for years of every kind.¹ Owners in fee are not capable of committing legal waste, since they are owners of the inheritance and may do with it as they please. Apart from statute, therefore, tenants in common or joint tenants in fee are incapable of committing waste. But by the Statute of Westminster II (13 Edw. 1, ch. 22) the action of waste was provided for between cotenants, and similar statutes have been enacted in many states.² Neither the English statute nor the statutes in the different states in any way attempt to define waste or to provide what acts shall be waste as between cotenants. Under the cases, however, in a rough way, and without any careful thought on the subject, acts which would be waste if committed by a tenant for life or for years are held to be waste as between cotenants.³ There is some authority, based on sounder reason, that any act of a cotenant in the prudent and reasonable exercise of owner-

1. See § 61, *ante*.

2. Co. Litt. 200a, 200b; *Wilkinson v. Haygarth*, 12 Q. B. 837; N. Y. Code Civ. Pro., § 1656 (providing for an action of waste between cotenants, and the recovery of treble damages). For similar statutes in other states, see cases in notes following.

3. *Elwell v. Burnside*, 44 Barb. (N. Y.) 447 (cutting of trees from land purchased by the parties solely for the timber, held waste. In other words it was held waste to use the land for the one purpose for which it was purchased, viz.: to realize a profit on the timber); *McCord v. Oakland, etc. Min. Co.*, 64 Cal. 134 (working of a quick silver mine already opened not waste, since it

would not be waste in case of a tenant for life or for years, but tenant was held liable to account); *Irwin v. Covell*, 24 Pa. St. 162; *Benedict v. Torrent*, 83 Mich. 181 (dicta, holding that grant of a cotenant's interest in trees not good as against the other cotenant, this result being sound quite apart from the question of waste); *Cecil v. Clark*, 47 W. Va. 402 (mining and sale of coal held waste, tenant held liable to account. In cases such as this the tenant is not really held for waste, but for profits under statute for sale of part of the corpus of the land); *Johnson's Adm'r v. Johnson*, 2 Hills Eq. (S. C.) 277; *Morrison v. Morrison*, 122 N. C. 598. See, also, *Murray v. Haverty*, 70 Ill. 318.

ship is not waste as between cotenants in fee; that it is not waste for such cotenants to cut timber which is fit for cutting, to open mines where the common property is mineral lands, and the like, since such are acts of the reasonably prudent owner in fee in the exercise of his ownership. Any act of wanton destruction of buildings, the cutting of shade trees, or of trees not yet large enough for use as timber, and the like, are waste as between cotenants in fee, since they are not acts of prudent ownership, but tend to the waste and destruction of the common property.⁴ We have seen that the tenant cutting timber or working a mine or quarry must account to his cotenants for their share of the net profits.⁵ If such acts are in the exercise of reasonable and prudent ownership there is no sound reason why the tenant should be compelled to respond in treble damages for waste under the various statutes.⁶

4. *Martyn v. Knollys*, 8 Term Rep. 145; *Maxwell v. Maxwell*, 31 Me. 184 (*dicta*); *McCord v. Oakland, etc. Min. Co.*, 64 Cal. 134 (the court saying, "The word 'waste' is not an arbitrary term to be applied inflexibly without regard to the quantity or quality of the estate, the nature and species of the property, or the relation to it of the person charged to have committed the wrong"); *Russell v. Merchants' Bank, etc.*, 47 Minn. 286; *Edsall v. Merrill*, 37 N. J. Eq. 114.

5. See § 215, *ante*.

6. There seems to be little authority, apart from *dicta*, on either side of this question, which may fairly be regarded as still open and unsettled. In *Cosgriff v. Dewey*, 164 N. Y. 1, the court compelled the defendant, tenant in common, to account for trap rock taken from a quarry which had been opened and worked before he acquired his interest as tenant in common, and

which he worked as tenant in common after acquiring his interest. The court held that he was liable for waste, but compelled him to account for his cotenant's share of the rock so taken. He was not required to pay treble damages in accordance with the provisions of § 1656 of the Code, to which the court refers as authority for the proposition that the defendant was liable in waste. The court said that he could not be compelled to account for the use of the premises nor for rents and profits, there being no ouster. Nevertheless, though they declared his act to be waste, they compelled him to account exactly as though he were accounting for profits lawfully derived from the reasonable use of the property. To say that the working of this quarry was waste, in view of the fact that it had been opened and operated as such before the defendant acquired his interest,

An injunction to stay waste will not be granted in equity in favor of one cotenant and against another unless it appears that the injury threatened will jeopardize the cotenant's interest, or unless the waste is malicious in character or so unusual or unreasonable as to constitute a wanton destruction of the estate.⁷

and of the further fact that the property was valueless except for use and operation as a stone quarry, is in violation of precedent and reason. If he were a mere tenant for years it would not be waste under such circumstances. If a cotenant cannot be held liable to account for profits derived from the sale of minerals in such case under the Statute of Anne and like statutes in the different states, then there is no remedy, since it is preposterous to assert that the working of an opened mine or quarry by a tenant in common is waste for which he may be held in treble damages. Furthermore, if the sole or principal value of the common property lies in its use for quarrying or mining purposes, it is unreasonable and contrary to rules of ownership to hold that neither tenant shall be permitted to open up the quarry or mines and make use of the property in the one way in which it is capable of beneficial use, except on penalty of treble damages. The opening of a mine or quarry in any such case is strictly in accord with the reasonable use and development of the property, not in wasting of it. Nevertheless the Court of Appeals again held, *Abbey v. Wheeler*, 170 N. Y. 122, that the taking by a cotenant of minerals from mining land was waste. This

anomalous situation demands early correction.

In each of the cases cited in this and the preceding notes where the tenant was compelled to account for minerals or timber, exactly the same result would be reached by compelling him to account therefor as for profits received by him as a result of a sale of part of the corpus of the land under the Statute of Anne. In some cases the tenant was required to account, though the working of the mine was held not to be waste. It is true that the highest court in England has decided that the Statute of Anne is to be limited to *rents* received by the tenant, not applying to profits from a sale of timber or the like. But this narrow view is not generally taken in this country, where in these cases the tenant is compelled to account. Why call it waste, when it is not waste? A reasonable interpretation of the Statute of Anne and similar statutes fully justify the compelling of an accounting in all such cases. Where waste and destruction of the cotenant's interest is really committed, then let the offending tenant be held therefor in waste, not in account.

7. *Mott v. Underwood*, 148 N. Y. 463; *Obert v. Obert*, 5 N. J. Eq. 397; *McCord v. Oakland*, etc. Min. Co., 64 Cal. 134.

§ 219. Purchase of Outstanding Title by Cotenant.—

Where cotenants acquire their interests at the same time from the same source, as where they take by the same deed or will, or by inheritance from a common ancestor, their relationship is of so close a character, involving mutual trust and confidence between them, that in equity the purchase of an outstanding superior title by one of them will be regarded as for the benefit of all, the others contributing their share toward the cost thereof within a reasonable time. The purchasing tenant cannot set up such a title and oust his cotenants from the common property, but must let them have their proportionate share of the benefits therefrom upon their contributing their proportionate share of the cost.¹ If they fail within a reasonable time to make such contribution, they lose this equitable right and the title so acquired is good against them.²

This rule excludes cotenants who acquire their interests at different times from different sources. Such tenants are strangers to each other without any particular community of interest that would justify such a rule. Though many of the cases state the rule without this qualification, the unities existed as a matter of fact, and there was no occasion to go into the question.³

The rule does not apply where the cotenancy is ended by adverse possession or by sale for taxes after the period of redemption has expired. Each tenant may then buy the

1. *Van Horne v. Fonda*, 5 Johns. Ch. (N. Y.) 389; *Carpenter v. Carpenter*, 131 N. Y. 101; *Roberts v. Thorn*, 25 Tex. 728; *Boyd v. Boyd*, 176 Ill. 40; *Stevens v. Reynolds*, 143 Ind. 467; *Frentz v. Klotsch*, 28 Wis. 312, and cases in notes following.

2. *Mandeville v. Solomon*, 39 Cal. 125, and cases in preceding note.

3. *Van Horne v. Fonda*, 5 Johns. Ch. (N. Y.) 389; *Roberts v. Thorn*,

25 Tex. 728; *Moon v. Jennings*, 119 Ind. 130; *Stevens v. Reynolds*, 143 Ind. 467; *Burr v. Mueller*, 65 Ill. 258 (dicta, but see *Bracken v. Cooper*, 80 Ill. 221). In the other cases cited in notes 1 and 2, *supra*, it appeared that the unities were present, and therefore they contain nothing necessarily inconsistent with this limitation of the rule.

property as he pleases without regard to the others.⁴ So where the interest of one is sold under execution, the other may bid at the sale.⁵ Here there is no conceivable violation of any duty, legal or moral. The cotenant's bidding at the sale only serves to increase the price which is realized for the interest of the other tenant. A cotenant for life or for years may purchase the remainder or reversion without regard to his cotenants, since the title he acquires is in no sense adverse or hostile.⁶

The rule applies to titles acquired by purchase at a sale on foreclosure of a mortgage affecting the entire property, to which the interest of all the tenants are subject, the others having the right to share in the benefits of the purchase provided they contribute their share toward the cost within a reasonable time.⁷ There would seem to be no reason for this if all are adults and parties to the foreclosure, having equal opportunities to bid in the property at the sale, and it is submitted that the rule would not apply in such case. In the cases above cited the foreclosure was brought about by one or more of the cotenants to defeat the interests of others who were infants, involving elements of fraud which would be quite sufficient to give rise to a constructive trust in favor of the cotenants sought to be excluded.

It is the duty of each cotenant to pay taxes assessed against the property, of one as much as of any other. Therefore one of them cannot take advantage of his own wrong

4. *Freeman Coten.*, §§ 161, 162; *Alexander v. Sully*, 50 Iowa 192; *Watkins v. Eaton*, 30 Me. 529.

Where a tenant in common is holding adversely claiming title in severalty, the rule does not apply, the tenants being in a position of hostility with reference to the title. *Wells v. Chapman*, 4 Sandf. Ch. (N. Y.) 312; *Wright v. Sperry*, 21 Wis. 336.

5. *Gunter v. Laffan*, 7 Cal. 588; *Burr v. Mueller*, 65 Ill. 258; *Elston v. Piggott*, 94 Ind. 14.

6. *Ramberg v. Wahlstrom*, 140 Ill. 182.

7. *Carpenter v. Carpenter*, 131 N. Y. 101; *Knolls v. Barnhart*, 71 N. Y. 474; *Smith v. Osborn*, 86 Ill. 606; *Gibson v. Winslow*, 46 Pa. St. 380.

and purchase the property at a tax sale to the exclusion of his cotenants. For the same reason he cannot purchase an outstanding tax title before the period of redemption (usually three years) has expired, and set it up against his cotenants. In either case he is really paying the taxes, freeing the property from the lien, and he is entitled to contribution from the others toward the cost.⁸ But after the period of redemption has expired and the tax title has become absolute, terminating the cotenancy, any cotenant may purchase it without incurring any duty toward his former cotenants.⁹

§ 220. Voluntary Partition.—Tenants in common, joint tenants and coparceners have always been able to partition the common property among themselves by mutual deeds.¹ As between joint tenants a deed of release is the more appropriate form, though a deed of grant will serve the same purpose. Since each joint tenant is seised of the entire property as a member of the unity, he becomes sole owner of the part assigned to him on the partition by a mere release of his cotenant's interest therein, the technical word "heirs" not being required, since he is already seised of the fee.² In the case of tenants in common, however, deeds of grant are necessary, as was the word "heirs" under the common law, since each is seised of a separate and distinct estate in fee which must be conveyed from one to the other as to each portion on the partition of the property between them.³

8. Hurley v. Hurley, 148 Mass. 444; Pa. St. 139; Watkins v. Eaton, 30 Page v. Webster, 8 Mich. 263; Goral- Me. 529; Hurley v. Hurley, 148 Mass. ski v. Kostuski, 179 Ill. 177; Tanney 444.

v. Tanney, 159 Pa. St. 277; Clark v. 1. See notes following.

Lindsey, 47 Oh. St. 437; Conn v. 2. Rector v. Waugh, 17 Mo. 13; Conn, 58 Iowa 747; Easton v. Scofield, Litt., § 304; 2 Bl. Com. 185. See § 81, 66 Minn. 425. note 5, ante.

9. Alexander v. Sully, 50 Iowa 192; 3. Woodhull v. Longstreet, 18 N. J. Remboth v. Zebe Run Imp. Co., 29 L. 405; Porter v. Hill, 9 Mass. 34, 35;

Before the Statute of Frauds oral partition followed by exclusive possession by each tenant of the part set off to him was effective without written conveyance in all cases of joint estates in possession except estates in entirety, the transfer by livery of seisin being sufficient. Since the Statute of Frauds, however, a conveyance in writing sufficient to satisfy the statute is necessary, since every voluntary partition necessarily involves the transfer of an interest in land, each tenant conveying to his cotenant his interest in that part of the land set off to his cotenant.⁴ In equity if after parol partition and the taking of exclusive possession by each of the tenants of the part assigned to him, one of the tenants improves his part, expending money and otherwise changing his position so that an injustice would result to him should the parol partition be rescinded, the other tenants will be estopped from denying the validity of the partition as made, and it will be declared valid and binding.⁵ There is some authority, principally *dicta*, that even at law a mere parol-partition followed by exclusive possession is effective, in spite of the Statute of Frauds, because the breaking of the unity of possession by such parol partition necessarily terminates the tenancy in common, joint tenancy or coparceny between the parties.⁶ The only tenable view

Ballau v. Hill, 47 N. H. 347; *Rector v. Waugh*, 17 Mo. 13; *Litt.*, § 304; 2 Bl. Com. 186.

4. Cases in preceding note.

5. *Wood v. Fleet*, 36 N. Y. 499; *Markoe v. Wakeman*, 107 Ill. 251 (holding that in case of long continued possession of separate portions partition by deed if necessary would be presumed); *Buzzell v. Gallagher*, 28 Wis. 678; *Horgan v. Bickerton*, 17 R. I. 483; *Byers v. Byers*, 183 Pa. St. 509 (holds that such partition is good at law as well as in equity); *Hank v. McComas*, 98 Ind. 460; *Bruce v.*

Osgood, 113 Ind. 360; *Tomlin v. Hilyard*, 43 Ill. 300; *Brown v. Wheeler*, 17 Conn. 345; *Tuffree v. Polhemus*, 108 Cal. 670.

6. *Wood v. Fleet*, 36 N. Y. 499 (*dicta*, since a clear case of equitable partition by estoppel existed here, tenant having made extensive improvements); *Byers v. Byers*, 183 Pa. St. 509 (on the ground that cotenants are already owners in possession, and a partition between them is not within the mischief sought to be guarded against by the statute).

In *Taylor v. Millard*, 118 N. Y. 244,

is, of course, that an instrument in writing sufficient to satisfy the statute is necessary, in order that a valid partition at law be made, leaving to a court of equity to determine whether the facts are sufficient to establish an equitable partition by estoppel in each case.⁷

At common law estates in entirety could not be partitioned, because of the disabilities of the wife. Under the Married Woman's Acts in most states such partition may now be effected either by mutual deeds between them in those states where a conveyance by one to the other is permitted or by a conveyance to a third party and by him to the husband and wife of separate portions of the land, or by sale of the property and a division of the proceeds.⁸

A voluntary partition between cotenants is binding on their wives in the absence of proof of fraud and collusion as against the wife of either party, so that the wife's inchoate right of dower is limited to the part which her husband receives in severalty, though the partition be effected without her knowledge or consent.⁹ But in such case the lien of a mortgagee, judgment creditor or other encumbrancer of a cotenant's interest is not affected, the partition being void as to him, subject to the power of the court to confirm the partition in equity, provided no wrong has been done the lienor or encumbrancer.¹⁰

the court held that though a parol partition was good, a parol provision that one tenant should have the right to enter and to pick apples from an orchard situated on the other's portion of the farm was void as an attempt to create a profit *a prendre*, a deed being necessary for the purpose.

7. See cases in note 5, *supra*.

8. See § 212, *ante*.

9. Potter v. Wheeler, 13 Mass. 504; Totton v. Stuyvesant, 3 Edw. Ch. (N. Y.) 527; Lloyd v. Conover, 25 N. J. L. 47.

10. Emson v. Polhemus, 28 N. J. Eq. 439.

Even if the undivided interest of the cotenant in the entire tract should be sold in the enforcement of the mortgage or other lien, the purchaser, in enforcing partition, would in most cases receive the part assigned to the cotenant in the voluntary partition, it appearing that the cotenants had entered on their several portions in severalty, the partition being fair and without prejudice to the rights of the lienors of either.

§ 221. Involuntary Partition.—Originally at common law the only joint estates subject to involuntary or compulsory partition were estates in coparceny.¹ By statutes enacted about 1540 compulsory partition between joint tenants and tenants in common was provided for.² But partition at law under these statutes was cumbersome and rigid, and had to be made without consideration of special circumstances and equities affecting the cotenants, so that at an early date equity assumed jurisdiction to the practical exclusion of partition at law. In 1833 a statute was enacted in England giving to equity exclusive jurisdiction in actions of partition.³ In this country also partition at law is obsolete, the action always being brought in equity. We have seen how in equity justice may be done between the parties on partition where one of them has made improvements or paid more than his share of interest, taxes or other charges.⁴ So, also, if one tenant owned land in severalty adjoining the common property it might be greatly to his advantage to have the part adjoining his land assigned to him on partition. This a court of equity would do if it could be done without injury to the other tenant or tenants. These things would be impossible in partition at law.⁵ Similarly it might be that physical partition could not be made without injury or injustice to one or all the tenants. In such case equity would order a sale and division of the proceeds among the tenants. Today it is uniformly the rule that a sale will be ordered where actual corporeal partition cannot fairly be made, or where the best interest of all require a sale and the division of the proceeds rather than an actual physical partition.⁶

1. See § 208, note 2, *ante*.

2. St. 31 Henry VIII, ch. 1, and 32 Henry VIII, ch. 32.

3. St. 3 and 4 William IV, ch. 27, § 36.

4. See § 217, *ante*.

5. See § 217, *ante*, and cases there cited; *Hall v. Piddock*, 21 N. J. Eq.

311; *Freeman, Cotenancy*, § 423.

6. Preceding note; also *Freeman, Cotenancy*, ch. 28; N. Y. Code Civ. Pro., §§ 1546, 1550, 1573-1579 (containing provisions for the sale of the premises by a referee appointed for the purpose, and the distribution of the proceeds).

§ 222. **Parties to Action of Partition.**—The rule both at law and in equity, except as modified by statute, is that the plaintiff in a partition suit must be a joint tenant or tenant in common in possession or having an immediate right to the possession.⁷ If he has a right of entry only, as for a breach of condition or as against another holding the property in adverse possession, he must recover possession by a lawful entry or by ejectment before he can sue in partition.⁸ The general rule, apart from statute, is that disputed questions of title cannot be litigated in the partition suit, which must wait until the dispute has been settled by an action at law. But by statute in some states such questions of title may be litigated and determined in the partition suit, and partition has become a favorite means of settling questions of this kind, particularly where they turn on the construction of a will, and the validity or invalidity of devises.⁹ Under these statutes a tenant in common who has been disseised may sue in partition, and the person in adverse possession or claiming a hostile title may be made a party defendant, the question of title being determined in the suit.¹⁰ Under these statutes the heir may start a partition suit, joining the other heirs and also the devisee under the ancestor's will, provided he allege and prove that the

7. Co. Litt. 167a; *Evans v. Bagshaw*, 8 Eq. 469, and cases in notes following.

8. *Bonvier v. B. & O. R. Co.*, 67 N. J. L. 281; *Slockbower v. Kanouse*, 50 N. J. Eq. 481; *Fenton v. Steere*, 76 Mich. 405; *Pierce v. Oliver*, 13 Mass. 211 (dicta).

In *Bacon v. Fay*, 63 N. J. Eq. 411, the court held that where an equitable title alone was involved the question would be determined in the partition suit without the aid of any statute, equity having sole jurisdiction over the question.

9. N. Y. Code Civ. Pro., § 1543; *Wallace v. McEchron*, 176 N. Y. 424; *Satterlee v. Kobbe*, 173 N. Y. 91; *Weston v. Stoddard*, 137 N. Y. 119; *Marshall v. Crehon*, 13 Met. 462; *Pillow v. Southurst, etc. Co.*, 92 Va. 144; *Gage v. Bissell*, 119 Ill. 298; *Martin v. Walker*, 58 Cal. 590 (holding that tenant ousted by cotenant may sue in partition, question of cotenant's claim to sole ownership being settled in the partition action).

10. *Satterlee v. Kobbe*, 173 N. Y. 91; *Wallace v. McEchron*, 176 N. Y. 424; *Martin v. Walker*, 58 Cal. 590.

devise was void. If the will is found to be valid the action in partition is defeated.¹

In the absence of statutory provision a reversioner or remainderman subject to a precedent life estate cannot maintain partition against his cotenant remaindermen, nor can the life tenant maintain partition against the remaindermen.² By statute in several states it is provided that partition may be maintained as between reversioners and vested remaindermen who are cotenants in reversion or remainder. The partition must be made subject to the prior life estate, and the premises cannot be sold outright in such case without the written consent of the life tenant, proved and certified as a deed to be recorded.³

All other persons having an interest or estate in the property, including other cotenants, owners of prior particular estate for life or for years, a husband entitled to curtesy or a wife entitled to dower must be made parties defendant.⁴ Encumbrancers and lienors should also be joined in order that their liens may be bound by the partition, attaching in each case to the part set off to the cotenant whose undivided interest was affected by the lien. If the property is sold the amount due on said liens will be paid out of the

1. N. Y. Code Civ. Pro., § 1537; *Ellerson v. Westcott*, 148 N. Y. 149.

2. *Seiders v. Giles*, 141 Pa. St. 93; *Hodgkins's Petition*, 12 Pick. (Mass.) 374; *Jameson v. Hayward*, 106 Cal. 682.

3. N. Y. Code Civ. Pro., § 1533 (this section also provides that where such sale cannot be made without great prejudice to the owners the complaint must be dismissed without prejudice to bring the action again on the termination of the particular estate); *Campbell v. Stokes*, 142 N. Y. 23; *Smith v. Gaines*, 38 N. J. Eq. 65; *Deshong v. Deshong*, 186 Pa. St. 227.

As to parties plaintiff generally in New York, see Code Civ. Pro., §§ 1532-1538.

4. N. Y. Code Civ. Pro., § 1538 (providing that every person having an inchoate right of dower in an undivided share or in any part of the property must be made a party. The weight of authority, apart from statute, is that the wife need not be joined, her right of dower being subject to the partition of the property, and being limited to the part set-off to the husband on the partition. *Potter v. Wheeler*, 13 Mass. 504; *Motley v. Blake*, 12 Mass. 280; *Totten v. Stuyvesant*, 3 Edw. Ch. (N. Y.) 527.

proceeds and charged against the cotenant against whose interest the lien existed.⁵ Vested and contingent remaindermen must also be joined in order to bind them by the partition. In the case of contingent remaindermen the court will direct that the proceeds of their interests be invested for whoever may eventually become entitled thereto on the subsequent happening of the contingency on which the remainder depends. If these persons are not joined their interests are not affected by the judgment in partition.⁶

§ 223. Judgment on Partition.—An interlocutory judgment is first secured, preceded by a reference in which is determined the respective shares of the cotenants, the liens on their shares, whether or not the property is capable of actual partition, or should be sold, whether allowance should be made to any cotenant for improvements, repairs or the like, and all other matters of fact set forth in the pleadings.⁷ If actual partition is to be made by metes and bounds a referee or commissioners are appointed for the purpose, or it is turned over to the sheriff's jury, who proceed to

5. N. Y. Code Civ. Pro., § 1540. This section provides that lienors may be joined, and that whether they be joined or not their liens attach to such share as is assigned the tenant on the partition.

Though encumbrancers seem not to be necessary parties as a matter of law they are proper parties, and the court may require that they be joined in order that a final disposition be made of the property and its proceeds and a final determination of all matters in controversy be reached. *Stewart v. Alleghany Nat. B.*, 101 Pa. St. 342; *Low v. Holmes*, 17 N. J. Eq. 148. See *Emson v. Poldhemus*, 28 N. J. Eq. 439, holding that a voluntary partition not consented to by a judg-

ment creditor of one of the cotenants did not affect his lien.

6. N. Y. Code Civ. Pro., § 1539; *Monarque v. Monarque*, 80 N. Y. 320 (holding that the interests of unborn children of the life tenant to whom the property was given in remainder are not barred by partition unless their interests are set forth in the pleadings and enough of the proceeds of sale are set apart to protect their interests in case of their subsequent birth). For provisions relating to parties defendant generally, see N. Y. Code, §§ 1538-1541.

7. N. Y. Code Civ. Pro., §§ 1545, 1561; *Freeman, Cotenancy*, §§ 521, 524; *Nungay v. Lackey*, 142 N. Y. 449.

make the division and report to the court. The final judgment confirms the partition as so made and reported, the statutes now rendering the judgment sufficient for the purpose without requiring conveyances between the tenants, as formerly required in equity in the absence of statute, equity acting *in personam*, never *in rem*.⁸ Where actual physical partition cannot be made without injustice or serious loss to the tenants, or to some of them, a sale is ordered, a referee being appointed to sell and to report a division of the proceeds in accordance with the interests of the tenants and their equities as found in the interlocutory judgment. The final judgment confirms the sale so made and directs distribution of the proceeds.⁹

The effect of the judgment is simply to determine all questions arising in the litigation with reference to the division of such interests in the property as the cotenants have, and to settle such disputed questions of title claimed by others as have been litigated in the action. If the title of the cotenants is defective for any reason the partition suit in no way corrects such defect, nor does it prevent a stranger from subsequently enforcing a superior title, he not having been joined in the action of partition.¹⁰

8. N. Y. Code Civ. Pro., §§ 1549-1559; *Woodhull v. Little*, 102 N. Y. 167; *Swett v. Swett*, 49 N. H. 264; *Freeman, Cotenancy*, § 527.

If on actual physical partition one receives necessarily more than his share the court will require the payment of a sum, called *owelty*, to the others, to equalize the partition. *Smith v. Smith*, 10 Paige (N. Y.) 470,

477; *McCaudless App.*, 98 Pa. St. 489; *Hall v. Piddock*, 21 N. J. Eq. 311 (dicta).

9. N. Y. Code Civ. Pro., §§ 1546, 1550, 1573-1579; *Fisher v. Hershey*, 78 N. Y. 387; *Smith v. Trustees*, 36 App. Div. (N. Y.) 388.

10. *Greenlief v. Brooklyn, etc. R. Co.*, 141 N. Y. 395.

CHAPTER XII.

CONDITIONAL ESTATES.

§ 224. **Nature of Conditional Estates.**—Any estate, whether it be for years, for life or in fee, which is subject to forfeiture for the breach of a condition contained in the instrument creating it, is an estate on condition. Forfeiture enforced by entry or by the bringing of an action of ejectment or equivalent action is the distinguishing characteristic of these estates. The mere breach of the condition does not, *ipso facto*, end the estate. It continues exactly as before until the person having the right to enforce the forfeiture elects to do so either by entry on the land expressly for that purpose, or more commonly, by starting an action of ejectment to recover the property because of the breach. The estate then comes to an end as completely as though it had never existed, the title revesting in the grantor or his heirs or the heirs of the deviser, or in the landlord, as the case may be, as completely as though the conditional estate had never been created.¹ All mortgages or judg-

1. Co. Litt. 214b, 218a; 2 Bl. Com. 155; United States v. Loughrey, 172 U. S. 206; Nicoll v. N. Y. & Erie R. Co., 12 N. Y. 121; Cornelius v. Ivins, 26 N. J. L. 376; Osgood v. Abbott, 58 Me. 73, and cases in notes following.

Entry was necessary in the case of forfeiture of freehold estates on condition, because such estates, requiring livery of seisin in their creation, could be brought to an end only by an act of equal solemnity. Co. Litt. 214a, 218b. The entry must be made with intent to accomplish a forfeiture expressed or evinced in some overt way. Bowen v. Bowen, 18 Conn. 535; Trustees, etc. v. City of New

York, 173 N. Y. 38. Where the conditional property right is incorporeal, which cannot be created by livery, nor terminated by entry, since entry is impossible, a claim of forfeiture duly made by the person entitled to enforce the forfeiture is sufficient. Co. Litt. 218a; Ellis v. Town of Pelham, 106 App. Div. (N. Y.) 145 (easement). Entry was never necessary to terminate a tenancy for years for breach of condition, since not created by livery of seisin, being an estate less than freehold. Co. Litt. 214b. A forfeiture of a tenancy for years is enforced by an ejectment suit or by the starting of summary

ment or other liens created thereon during the existence of the conditional estate are brought to an end at the same time since they all attach subject to the condition.² For the same reason any tenancy for years, subtenancy, life estate, or other estate created by the tenant on condition out of his interest are destroyed by the enforcement of the forfeiture

proceedings of ouster provided for by statute in most states. *Quinn v. McCarty*, 81 Pa. St. 475; *Whitwell v. Harris*, 106 Mass. 532; *Conger v. Duryee*, 90 N. Y. 594.

The starting of an ejectment suit is the equivalent of an entry, an actual entry being no longer necessary after the introduction of the fictions in ejectment suits involving an admission of entry by the plaintiff or his fictitious tenant, alleged to have been wrongfully ousted by the defendant. An entirely sufficient and more satisfactory reason for the modern rule that the starting of ejectment is sufficient without formal entry is that estates on condition are no longer created with livery of seisin, and therefore the reason for the old rule requiring a formal entry no longer exists. By statute in most states ejectment may now be maintained without a prior entry, a right to enter only being required, the old fictions in ejectment suits being dispensed with. *Jones v. Carter*, 15 Mees. & W. 718; *Jackson v. Chrysler*, 1 Johns. Cas. (N. Y.) 125; *Nicoll v. N. Y. & Erie R. Co.*, 12 N. Y. 121; *Cornelius v. Ivins*, 26 N. J. L. 376, and cases therein cited; *Plumb v. Tubbs*, 41 N. Y. 442; *Schlesinger v. Kansas City R. Co.*, 152 U. S. 444.

That the formality of entry is not required since statutes have dispensed with the need of entry either actual

or fictitious as a prerequisite of ejectment, see *Austin v. Cambridgeport Parish*, 21 Pick. (Mass.) 215; *Sioux City, etc. R. Co. v. Singer*, 49 Minn. 301; *Ellis v. Kyger*, 90 Mo. 600.

If the person entitled to enforce forfeiture is already in possession, entry is, of course, not required. The expressed intent to enforce the forfeiture and to hold the property accordingly is sufficient. *Lincoln, etc. Bank v. Drummond*, 5 Mass. 321; *Andrews v. Senter*, 32 Me 394; *Co. Litt.* 218a.

It should be remembered that an action in ejectment, by which breach of the condition and forfeiture are established judicially as a matter of record, is in every way the most satisfactory way to enforce forfeiture, establishing the title of the plaintiff as a matter of record, avoiding the uncertainty involved in an entry without anything of record to establish the forfeiture.

2. *Moore v. Pitts*, 53 N. Y. 85 (lien of judgment recovered against owner of conditional estate destroyed by the forfeiture); *Schlesinger v. Kansas City R. Co.*, 152 U. S. 144; *Carnegie Nat. Gas Co. v. Philadelphia Co.*, 158 Pa. St. 317; *Williams v. Vanderbilt*, 145 Ill. 238 (mechanic's lien); *Thomas v. Record*, 47 Me. 500 (lien of judgment creditor); *Sioux City, etc. R. Co. v. Singer*, 49 Minn. 301.

which destroys the estate out of which they were created. No matter how many times the estate on condition may have passed by conveyance, devise or descent, it always remains subject to the condition, each succeeding owner being bound by it exactly as was the original owner.

A covenant in a deed is either a purely personal contract between the grantor and grantee in no way affecting the estate, or it is a restrictive covenant in the nature of an easement for the benefit of property retained by the grantor. In no case does a mere breach of covenant affect the duration of the estate conveyed by the deed. In case of breach the covenantee may sue for damages, and in all cases of negative restrictive covenants he may also secure an injunction restraining any further breach.³ If a right of entry is reserved for breach of covenant, such reservation makes the covenant a condition as well, so that the covenantee may enforce it by recovering damages for a breach or by injunction in equity or by enforcing forfeiture for breach of condition. In leases the covenants therein contained are generally made conditions in this way by reserving a right to enter for their breach.⁴

Estates upon limitation, as distinguished from conditional estates, are created to continue up to the happening of some future contingent event, and come to an end on the happening of the limitation *ipso facto*, without entry. Words of duration are employed in their creation, such as "while," "during," "as long as," "until" and the like. They are more fully discussed hereafter.⁵

Conditional estates, as discussed in this chapter, are estates upon condition subsequent, title vesting in the tenant on condition subject to forfeiture for breach of the condition.

3. *Woodruff v. Trenton Water Power Co.*, 10 N. J. Eq. 489, at 508 (good discussion of distinction between covenants and conditions); *Spear v. Fuller*, 8 N. H. 174; *Graves v. Deterling*, 120 N. Y. 447.

4. *Jackson v. Brownson*, 7 Johns. (N. Y.) 227; *Quinn v. McCarty*, 81 Pa. St. 475. See § 189, *ante*, under landlord and tenant.

5. See § 234, *post*.

Estates on condition precedent are discussed under future estates. In case of a condition precedent the estate does not vest until the happening of the condition. Every contingent remainder and every future executory contingent estate is an estate on condition precedent.⁶ The law favors the vesting of estates, and therefore in case of doubt the courts hold that an estate on condition subsequent arises, the estate vesting at once subject to being divested, not an estate on condition precedent.⁷ Where the condition calls for the improving of the property by the erection of buildings, the building of a railroad, or the like, it is clear that a condition subsequent is intended, since title is to vest at once in order that the grantee may proceed with the making of the improvements required.⁸

§ 225. Creation of Conditional Estates.—The law does not favor forfeiture, and therefore if the language used in a deed or will may reasonably be construed as creating a covenant, an equitable charge or trust, or an easement, the courts refuse to find that an estate upon condition involving a forfeiture was intended, but will enforce the provision as a covenant, easement, charge or trust. The terms usually employed to create a conditional estate are “on condition that,” “provided that,” or other appropriate language of condition. No set form is necessary. If a reasonable interpretation of the instrument requires that the estate created be given effect as an estate on condition the courts will so decide though the usual terms of condition are not employed.¹ On the other hand, as stated above, the courts

6. See Ch. XIII. *post*.

7. 4 Kent Com. 129; Nicoll v. N. Y. & Erie R. Co., 12 N. Y. 121; Uppington v. Corrigan, 151 N. Y. 143; Cornelius v. Ivins, 26 N. J. L. 376; Hayden v. Inhabitants of Stoughton, 5 Pick. (Mass.) 528; U. S. v. Tenn. C. & I. Co., 176 U. S. 242; Finlay v.

King's Lessee, 3 Pet. (U. S.) 346; Donnelly v. Estes, 94 Wis. 390.

8. Underhill v. Saratoga R. Co., 20 Barb. (N. Y.) 455; Jones v. C. & O. R. Co., 14 W. Va. 514, and cases in preceding note.

1. 1 Shars & B. Lead. Cas. 123-126.

will construe the language as creating a covenant, easement, charge or trust, even though express terms of condition are employed, if it appear that the real purpose of the parties was not to create an estate subject to forfeiture, but an estate subject to a covenant, easement, charge or trust capable of specific enforcement as such.² An express clause of forfeiture in case of breach, as where it is provided that the grantor shall have a right to enter, or that the estate shall cease, determine and become void in case of a breach, is conclusive in all cases leaving no room for interpretation. The intention in such cases can only be to create an estate on condition.³ But in a case of a deed having no forfeiture clause but providing "that these presents are upon this express condition, that the aforesaid premises shall not * * * be at any time hereafter used or occupied as a tavern or public house of any kind," the court held that this provision should be construed as a restrictive covenant running with the land for the benefit of the adjoining estate belonging to the grantor, enforceable by injunction in case of a breach, not by forfeiture, the grantor's purpose being to protect his adjoining property, fully accomplished by construing the provision as a covenant, a breach of which would be enjoined, and not requiring the drastic remedy of forfeiture.⁴ In another case the grant was "upon the express condition that the said railroad company shall, at all times, maintain an opening into the premises hereby conveyed opposite to the Exchange Hotel, for the convenient access of passengers and their baggage." The court held

2. *Graves v. Deterling*, 120 N. Y. 447; *Post v. Weil*, 115 N. Y. 361; *Avery v. N. Y. C. etc. R. Co.*, 106 N. Y. 142; *Cunningham v. Parker*, 146 N. Y. 29; *Hagood v. Houghton*, 22 Pick. (Mass.) 480; *Sohier v. Trinity Church*, 109 Mass 1; *Scovill v. McMahon*, 62 Conn. 378; *Mills v. Davison*, 54 N. J. Eq. 659; *Star Brew. Co.*

v. Primas, 163 Ill. 652, and cases cited in notes following.

3. *Cornelius v. Ivins*, 26 N. J. L. 376; *Walters v. Bredin*, 70 Pa. St. 235; *Kew v. Trainor*, 150 Ill. 150; *Atty. Gen. v. Merrimack Mfg. Co.*, 14 Gray (Mass.) 612; *Warner v. Bennett*, 31 Conn. 468.

4. *Post v. Weil*, 115 N. Y. 361.

that the provision was intended as a covenant creating an easement of way over the land conveyed from the hotel to the station for the benefit of the hotel property which the railroad company would be restrained from closing. What the grantor wanted was the maintenance of the way, not a forfeiture in case of a breach, there being no express clause of forfeiture.⁵ In any case of a devise or bequest of property on condition that the devisee or legatee pay stated sums to other persons named within a stated time or within a reasonable time if no fixed time is stated, the courts hold that the provision creates an equitable charge which will be enforced by a sale of so much of the property devised as may be necessary to make the payments called for, not a condition enforceable by forfeiture which would mean that the heirs would take the property and the testator's expressed intent would be defeated. In a case of this kind it is obvious that a forfeiture was not intended as it would defeat the testator's expressed purpose.⁶ A conveyance to a bishop "on condition that it be forever held for the use of the Protestant Episcopal Church" was held to create a trust, the bishop holding in trust for the church, not a defeasible estate on condition.⁷ Other illustrations appear in the notes.⁸

5. *Avery v. N. Y. C. etc. R. Co.*, 106 N. Y. 142.

6. *Cunningham v. Parker*, 146 N. Y. 29; *Woodruff v. Walling*, 31 Iowa 533; *Will v. Simmonds*, 55 Wis. 637; *Gray, Perpetuities*, § 282, note.

See *contra*, *Wheeler v. Walker*, 2 Conn. 196, illustrating clearly how giving effect to such a provision as a condition defeats the testator's intentions. Here the residuary estate was given to David and Nathan "they jointly and severally paying to my two daughters * * * the sum of three hundred dollars each, within one year after my decease." The court

enforced a forfeiture for a failure to pay one of the legacies as provided. The result was that David lost his share of the residuary estate, and the daughters, instead of getting \$300 each as intended, received an undivided share as though the testator had died intestate. By giving effect to the provision as a charge on the residue given to the two sons the testator's will would be carried out exactly as he intended, each of the daughters receiving the legacy of \$300, and the sons taking the balance of the residue.

7. *Neely v. Hoskins*, 84 Me. 386;

The mere statement of the use to which the land is to be put, or the purpose of the conveyance or devise does not create an estate on condition. A forfeiture will never be implied. It must be provided for by the deed or will in such way that it cannot reasonably be avoided in order to create an estate on condition.⁹

Nevertheless where the intent of the testator or grantor cannot effectually be carried out except by giving effect to the gift as an estate on condition, it will be so construed, though no express provision for forfeiture appear in the instrument.¹⁰ Therefore where it is clear that a trust was not intended, and where the provision is incapable of en-

Mills v. Davison, 54 N. J. Eq. 659;
 Sohler v. Trinity Church, 109 Mass.
 1.

8. In Skinner v. Shepard, 130 Mass. 180, the grant was "subject to the condition that no building shall ever be placed on that part of the same lying within twenty-five feet of said street." This was construed as a restrictive covenant, no forfeiture being provided for. It was merely personal since the grantor was not the owner of any adjoining land for the benefit of which the restriction was made. It therefore ceased on the grantor's death. In Woodruff v. Woodruff, 44 N. J. Eq. 349, the deed was on condition that the grantor should have the right to repurchase after the grantee's death for an amount to be fixed by appraisal. This, obviously, was a covenant to reconvey, not a condition involving forfeiture.

In addition to the cases heretofore cited on this question of construction, see Paschall v. Passmore, 15 Pa. St. 295, 307; Sumner v. Darnell, 128 Ind. 38.

9. Stuart v. Easton, 170 U. S. 383;

Sumner v. Darnell, 128 Ind. 38;
 Farnham v. Thompson, 34 Minn. 330.

10. In Horner v. Chicago, etc. R. Co., 38 Wis. 165, where the land was conveyed "only for depot and for other railroad purposes," the court held that a conditional estate was intended, the grantor owning adjoining lands which would be increased in value by the improvements for which the land was conveyed, the provision being otherwise ineffective.

In any case where the condition is that improvements shall be made, as the building of a railroad, erection of a school or church, the provision being unenforceable as a covenant and a trust not being intended, it will be given effect as a condition, language of condition being employed. This is true in any case where the provision would be ineffective as a covenant, easement, trust or charge, though there be no express clause of forfeiture. Nicoll v. N. Y. & Erie R. Co., 12 N. Y. 121; Uppington v. Corrigan, 151 N. Y. 143; Hayden v. Inhabitants of Stoughton, 5 Pick. (Mass.) 528; Cornelius v. Ivins, 26 N. J. Eq. 376 (dicta).

forcement as an easement or a covenant or as a charge, language of condition will always be effective as creating an estate on condition, though there be no express reservation of a right of entry or other forfeiture provision.¹¹

§ 226. The Right of Entry for Breach of Condition.—Where an estate in fee on condition is created by deed or will all that remains in the grantor or in the heirs of the deviser is a possible right of entry in case the condition is broken. This is a mere possibility, not amounting to an estate, which cannot be assigned, conveyed or devised. On the death of the grantor it passes to his heirs, not by inheritance, but to the heirs as the representatives of the grantor as to his realty.¹ Since it is not an estate it is not rendered alienable or devisable by statutes providing that contingent remainders and other future contingent executory estates may be conveyed and devised.² After breach

11. See preceding note.

1. Co. Litt. 214a, 214b; Nicoll v. N. Y. & Erie R. Co., 12 N. Y. 121; Uppington v. Corrigan, 151 N. Y. 143; Rice v. Bost. & W. R. Corp., 12 Allen (Mass.) 141; Merritt v. Harris, 102 Mass. 326.

The right of entry probably originated in the feudal right of the overlord to enter in case the vassal failed to render feudal services, the right of entry being reserved in the grant. Co. Litt. 201a, Butler's note.

The reason for the rule that the right of entry, either before or after breach of condition, could not be assigned was the prevention of maintenance. As expressed by Coke, the reason for this rule was that "under color thereof pretended titles might be granted to great men whereby right might be trodden down, and the weak oppressed, which the common

law forbiddeth, as men to grant before they be in possession." Co. Litt. § 347.

"It is a maxim of law, that nothing which lies in action, entry or re-entry, can be granted over, in order to discourage maintenance." 1 Greenlief's Cruise Real Prop., tit. 13, ch. 1, § 15.

That the right of entry passes to the heirs of the grantor or other person entitled to enforce the condition by representation and not by descent, see 4 Kent Com. 17; Gray's Perpetuities, §§ 32-41; Uppington v. Corrigan, 151 N. Y. 143.

2. Uppington v. Corrigan, 151 N. Y. 143, and cases in preceding note.

By statute in England and in some of the states rights of entry before or after breach of condition may now be assigned or devised by the owner. 8 and 9 Vict., ch. 106, § 6,

of the condition the right of entry, which was a mere possible right before, becomes a vested right of entry and of action, by virtue of which the grantor or his heirs or the heirs of the deviser may enter or maintain ejectment, bringing the conditional estate to an end. This right of action or entry cannot be assigned or transferred any more than could the possible right before breach, and for the same reasons.³ An attempt to convey or assign this possible right of entry, either in express term or by a conveyance of the interest of the grantor in the land already conveyed in fee on condition, results at common law in a loss of the right, the original grantee holding thereafter free of the condition.⁴ The Statute 32 Henry VIII, c. 9, expressly prohibited

and 1 Vict. ch. 26, § 3, enacted in 1843 and 1837, respectively; *Cornelius v. Ivins*, 26 N. J. L. 376, and *Southard v. Central R. Co.*, 26 N. J. L. 13, construing statute of March 14, 1851 (providing for transfer by deed or will of the right of entry for breach of condition, as well as other future estates or interests in expectancy); *Hoyt v. Ketcham*, 54 Conn. 60 (referring to a similar Connecticut statute).

In *Hayden v. Inhabitants of Stoughton*, 5 Pick. (Mass.) 528, the court held that when a conditional estate created by will was subject to forfeiture for breach of condition, the residuary devisee under the same will was entitled to enforce the forfeiture, not the heirs of the testator, the court arguing that the residuary clause included the right of entry as part of the testator's residuary estate, as effectually as though it had been specifically devised over on breach of the condition as a conditional limitation. It is true the testator could have granted the prop-

erty over to another on breach of the condition, but he did not do so. He created a conditional estate, one of the incidents of which is that his heirs alone have the right to enter. The case is, therefore, wrongly decided.

See *Austin v. Cambridgeport*, 21 Pick. 215, holding that the right of entry may be devised, on the authority of *Hayden v. Stoughton*, *supra*, but extending the error in that case to include the power to devise a right of entry created by a prior deed, a good example of the way in which error will beget further error.

3. *Fowler v. Coates*, 201 N. Y. 251.

In *Bouvier v. Balt., etc., R. Co.*, 67 N. J. L. 281, the court held that after breach of condition the right of entry could be transferred quite independent of the New Jersey statute, since the policy of the law in that regard to avoid maintenance was not in force in New Jersey.

4. *Rice v. Boston, etc. R. Co.*, 12 Allen (Mass.) 141; *Hooper v. Cummings*, 45 Me. 359.

the granting or taking of any such right or interest under penalty of forfeiture of the interest granted. It may well be doubted today whether any such drastic penalty would be applied to modern conditions. It would seem to be quite sufficient to hold the attempted assignment of the right void without enforcing a forfeiture. Certainly the attempted assignment of a personal action in tort, or other unassignable chose in action, does not result in its forfeiture. The tendency of the modern law is to discard rules of the ancient common law providing for forfeitures, as in the case of the forfeiture incurred at common law by a life tenant through an attempt to convey by feoffment with livery a fee in the land held by him for life. There is little modern authority sustaining this rule, and what there is is based on the old authorities without the expression of any reason for the rule other than precedent. It is a rule which might well be regarded as obsolete because of the changed conditions of modern times.⁵

Under the ancient common law rights of entry reserved against tenants for years or for life on condition, were incapable of assignment with the reversion or remainder, so that a conveyance of the property subject to the term or the life estate destroyed the condition, the grantor having no

5. In *North v. Graham*, 235 Ill. 178, holding that a quit claim deed executed by the grantor purporting to convey the same property did not pass a possibility of reverter in the case of an estate upon limitation, there is no suggestion that the attempted conveyance worked a forfeiture, and in *Nicoll v. N. Y. & Erie R. Co.*, 12 N. Y. 121; *Boone v. Clark*, 129 Ill. 466, and *Paul v. Connersville, etc. R. Co.*, 51 Ind. 527, in each of which cases land had been conveyed to a railroad company for its right of way, subject to a condi-

tion, and the grantor had subsequently conveyed the farm subject to the right of way, it being claimed that the right of entry passed in each case, the courts in holding that the right of entry could not be conveyed do not suggest in any way that such attempted conveyance would result in a forfeiture of the right, though such a ruling would be decisive of each case, assuming there was an attempt to convey the right of entry in each case, which there was not.

right to enforce a forfeiture in case of breach, having parted with the reversion, and the grantee of the reversion not having that right, since it could not be assigned.⁶ By statute 32 Henry VIII, ch. 34, the law was changed in this respect, the statute providing that the right of entry in such case should pass with the reversion. Similar statutes have been enacted in many states, and in the others the statute is expressly or tacitly recognized as law. Therefore in the case of any estate for life or for years on condition, the right to enter for breach passes with the reversion as an inseparable incident thereof, to any grantee, devisee or heir to whom the reversion may pass, subject to the term or life estate. Therefore, on a conveyance of the reversion, the new landlord or owner subject to the life estate or term of years may enter to enforce a forfeiture incurred by the life tenant or tenant for years for breach of condition.⁷ In New York this extends to a lease or grant in fee upon condition, reserving a perpetual rent. The rent charge carries with it as an incident the right to enter for any breach of condition committed by the tenant to whomsoever it may be assigned or devised.⁸

§ 227. What Constitutes Breach of Condition.— Since the courts do not favor forfeitures the act constituting a breach for which a forfeiture will be enforced must be substantial

6. See cases in note 1, *supra*, also *Nicoll v. N. Y. & Erie R. Co.*, 12 N. Y. 121.

7. N. Y. Real Prop. L., § 223 (as to tenancies for years and leases or grants in fee reserving rents); *Nicoll v. N. Y. & Erie R. Co.*, 12 N. Y. 121. See § 189, *ante*, under landlord and tenant.

It appears to be settled that the grantee of part of the reversion cannot enforce a forfeiture for breach of condition against a tenant for years, since a forfeiture of part of

the premises for breach of condition will not be enforced. This rule does not apply where the division is made by operation of law when the reversion descends to heirs as tenants in common, nor when the conditional term was created in contemplation of a subsequent division. *Co. Litt.* 215a; *Cruger v. McLaury*, 41 N. Y. 219; *Tinkham v. Erie R. Co.*, 53 Barb. (N. Y.) 593.

8. N. Y. Real Prop. Law, § 223; *Nicoll v. N. Y. & Erie R. Co.*, 12 N. Y. 121.

as distinguished from a merely technical breach; it must be in violation of the true purpose and intent of the condition. Substantial compliance with the condition is all that is required.¹ Thus a grant of vacant property with the condition that it forever remain open as a public highway or square was not broken by the erection of a building which encroached a few inches on the land so granted, the encroachment not having been intentional.² The mortgaging of a leasehold is not a breach of a condition not to assign.³ Where land was conveyed subject to the condition that it be used for the purposes of a meeting house, which was duly erected, the ceasing to use the meeting house for a few years followed by the repair and subsequent use thereof for some time before the action was brought, was not a breach of the condition giving the right to enforce a forfeiture.⁴

Where no time is stated for compliance with a condition requiring affirmative action, such as the erection of a church, schoolhouse, or other public building, the grantee or devisee of the conditional estate has a reasonable time to comply with the condition. What is a reasonable time will depend on the facts of each case. Failure for more than ten years

1. *Rose v. Hawley*, 141 N. Y. 366; *Riggs v. Purcell*, 66 N. Y. 193; *Woodworth v. Payne*, 74 N. Y. 196; *Osgood v. Abbott*, 58 Me. 73; *Mills v. Evansville Sem.*, 58 Wis. 135; *Carter v. Branson*, 79 Ind. 14.

2. *Rose v. Hawley*, 141 N. Y. 366.

3. *Riggs v. Purcell*, 66 N. Y. 193.

4. *Osgood v. Abbott*, 58 Me. 73.

In some cases where the condition is made in terms applicable to the grantee or tenant and not to his assigns the courts, following this rule of strict construction against forfeiture, construe the condition as binding the grantee or tenant, but not his assignee, so that after as-

signment or reconveyance the estate or term is freed from the condition. *Emerson v. Simpson*, 43 N. H. 475; *Gannett v. Albree*, 103 Mass. 372; *Murray v. Harway*, 56 N. Y. 337. These cases are extreme. Unless the condition is expressly made personal to the grantee or tenant, in express terms binding him alone, the *estate* created by the deed or lease is affected by the condition as long as it lasts and to whomsoever's hands it may be transferred. Most of the cases cited under this chapter stand expressly or impliedly for this proposition.

to erect such a building as required by the condition has been held to be a breach as a matter of law.⁵

§ 228. **Waiver of Breach of Condition.**— On the breach of a condition the person having the right to enter may elect between enforcing the forfeiture, thereby terminating the conditional estate, and waiving the breach, thereby continuing and confirming the conditional estate as though the breach waived had not taken place. The effect of the waiver of a breach is to destroy the right to enter for that particular breach, without affecting in any way the possible right of entry for any subsequent breach of the condition. The grantor, landlord, or other person having the right to enter, cannot after a waiver change his mind and elect to enforce a forfeiture for the breach so waived.⁶ On the other hand, if he has elected to enforce the forfeiture by making an entry or by starting a suit in ejectment, he cannot then restore the tenancy or estate by a waiver of the breach. The estate or tenancy on condition is then at an end, and another grant or lease will be required, creating a new estate, to restore the property to the tenant.⁷ Therefore, where a landlord started ejectment against a tenant for a breach of condition actually committed, and subsequently discontinued the action, he could not thereafter maintain an action against the tenant for rent under the lease accruing several months after the starting of the ejectment suit, though the tenant had remained in possession,

5. *Uppington v. Corrigan*, 151 N. Har. R. Co., 12 Barb. (N. Y.) 440; Y. 143; *Trustees of Union College v. Conger v. Duryee*, 90 N. Y. 594; *City of New York*, 173 N. Y. 38; *Moses v. Loomis*, 156 Ill. 392; *Hayden v. Inhabitants of Stoughton*, Sharon Iron Co. v. Erie, 41 Pa. St. 5 Pick. (Mass.) 528; *Allen v. Howe*, 341; *Chippewa L. Co. v. Tremper*, 705 Mass. 241; *Pierce v. Brown*, 75 Mich. 36; *Griggs v. Landis*, 21 N. J. Eq. 494; *Hubbard v. Hubbard*, 97 Mass. 188.

6. *Goodright v. Davids*, Cowp. 803; *Davenport v. The Queen*, 3 App. Cas. 115; *Jones v. Carter*, 15 Mees & W. 718; *Ludlow v. N. Y. &*

7. *Jones v. Carter*, 15 Mees & W. 718.

since the starting of the action in ejectment ended the tenancy, and with it all liability for rent under the lease.⁸ Having elected either by a waiver or by entry or action of ejectment, the grantor, landlord, or other person having the right to enter is bound by his election, and cannot then take the other position.

A waiver may be express, where the breach is waived in express terms, or, more usually, it may be implied from some act of the landlord or grantor which amounts to an unequivocal recognition of the tenancy or estate on condition as continuing after the breach. The person waiving must have knowledge of the breach at the time, and his act must be inconsistent with the enforcing of a forfeiture, impliedly recognizing the tenancy as continuing after the breach and in spite of it. Thus the acceptance of rent falling due after the breach of the condition by the landlord with knowledge of the breach is a waiver thereof, since the taking of such rent is necessarily a recognition of the tenancy as continuing after the breach, and an expression of the landlord's election to permit the tenancy to continue as though no breach had been committed.⁹ The landlord must have knowledge of the breach, since he cannot waive that of which he knows nothing, and the rent must have accrued after the breach was committed.⁹ If it became due before the breach its acceptance thereafter is not a waiver, it being entirely consistent with the enforcement of a forfeiture that the landlord collect rent falling due before the breach. He could unquestionably enforce the forfeiture and enforce the collection of rent due before the breach at the same time.¹⁰

8. See preceding note.

9. *Goodright v. Davids*, Cowp. 803; *Davenport v. The Queen*, 3 App. Cas. 115; *Jackson v. Allen*, 3 Cow. (N. Y.) 220; *Hunter v. Osterhoudt*, 11 Barb. (N. Y.) 33; *Conger v. Dur-*

yee, 90 N. Y. 594; *Miller v. Prescott*, 163 Mass. 12; *Medinah, etc. Co. v. Currey*, 162 Ill. 441, and cases in notes following.

10. *Jackson v. Allen*, 3 Cow. (N. Y.) 220; *Hunter v. Osterhoudt*, 11

It is clear that when the forfeiture is enforced by entry or ejectment the tenancy is ended as of the date of the entry or the starting of the suit in ejectment, not as of the date of the breach of condition, and therefore, if some time has elapsed before forfeiture is enforced the tenancy continues up to that time, and the landlord may recover rent accruing after the breach and before the forfeiture, rent not being extinguished until the tenancy is brought to an end.¹¹ There seems to be some conflict of authority on the question of whether the landlord may accept rent accruing after the breach reserving by express terms the right to enforce the forfeiture thereafter. It is said that the acceptance of rent is a recognition of the continuation of the estate after the breach, and is necessarily a waiver, whether the landlord accepts without prejudice to his right of entry for the prior breach or not.¹² This can only be on the ground that the tenancy cannot continue after the breach subject to the right of entry for the prior breach. But where some time elapses before the forfeiture is enforced the landlord, after enforcing the forfeiture, may collect rent accruing before forfeiture and after the breach.¹³ It would seem, therefore, that there is nothing to prevent the parties from agreeing that the tenancy shall continue and rent be payable subject to the landlord's continuing right to enforce forfeiture for a breach committed before the rent accrued. The cases taking this view, that the conditional acceptance of rent or other act which would otherwise amount to a waiver, shall not be so construed, it being expressly stipulated that no waiver shall result, are in accord with sound reason.¹⁴

If the grantor or other person entitled to enforce the condition makes compliance with the condition impossible, or

Barb. (N. Y.) 33; *Miller v. Prescott*, 163 Mass. 12; *Medinah, etc. Co. v. Currey*, 162 Ill. 441.

11. See § 189, *ante*, under landlord and tenant.

12. *Davenport v. The Queen*, 3 App. Cas. 115.

13. See § 189, *ante*.

14. *Miller v. Prescott*, 163 Mass. 12; *Medinah, etc. Co. v. Currey*, 162 Ill. 441.

brings about the breach by his own act, he will not be permitted to enforce a forfeiture because of the breach for which he is himself responsible.¹⁵ This is strictly an implied license to break the condition since it precedes the breach, rather than the waiver of a breach already committed.

Mere silence or inaction with knowledge of the breach on the part of the person entitled to enforce forfeiture is not enough to constitute a waiver. He may bring his action in ejectment to enforce forfeiture at any time within the period allowed by the Statute of Limitations, generally twenty years.¹⁶ But if he stands by knowing of the breach, and permits the tenant on condition to expend money on improvements and otherwise change his position, his silence and failure to enforce the forfeiture under such circumstances will amount to a waiver. If in such case the reasonably prudent or average man in the position of the tenant would be justified in regarding his silence and inaction as amounting to an election on his part not to enforce the forfeiture, but to continue the tenancy, a waiver results as a matter of law.¹⁷ Thus where a grant of a strip of land for the tracks of a railroad was made on condition that the road be completed to a certain point by a stated date, and the railroad company failed to complete their road to the point named by the date specified, the silence and inaction of the grantor for a year and nine months during which time the road was completed to the designated point, followed by silence and inaction for several years more while the road was being extended beyond, depending on their title to the part already built on the grantor's land, was

15. *Baker v. Woman's Chr. Temp. Union*, 57 App. Div. (N. Y.) 290; *Elkhart Car Works v. Ellis*, 113 Ind. 215; *Jones v. C. & O. R. Co.*, 14 W. Va. 514.

16. *Jackson v. Crysler*, 1 Johns. Cas. (N. Y.) 125; *Trustees Union*

College v. City of New York, 173 N. Y. 38; *Gray v. Blanchard*, 8 Pick. 283.

17. *Ludlow v. N. Y. & Har. R. Co.*, 12 Barb. (N. Y.) 440; *Hooper v. Cummings*, 45 Me. 359; *Barrie v. Smith*, 47 Mich. 130.

held to amount to a waiver of the breach. In that case the court also found a waiver from the fact that after the breach the grantor required the railroad company to repair their fences along their railroad tracks in accordance with the terms of the conveyance to them of the land in question, a very good illustration of an implied waiver by acts unequivocally in recognition of the conditional estate as continuing after the breach.¹⁸

§ 229. Continuing Cause of Forfeiture.— Conditions are of three kinds: (a) Those calling for or forbidding a single act, capable only of a single breach, such as a condition that a schoolhouse be erected on the premises within five years, or that the grantee shall not marry a certain person, or the like. The waiver of the breach of such a condition necessarily ends the condition since it cannot be broken again, and there can be no further ground of forfeiture.¹ (b) Those calling for a succession of acts, such as a condition that the tenant pay the rent reserved in the lease each year, or that he pay the annual taxes, or forbidding acts which may be repeated many times, as a condition not

18. *Ludlow v. N. Y. & Har. R. Co.*, 12 Barb. (N. Y.) 440.

If the expense incurred by the tenant on condition is incurred by him in doing the very thing forbidden, or in preparation therefor, as in erecting a hotel and fitting out a bar room preparing to violate the condition not to engage in the liquor business on the premises, it is clear that there would be no waiver in the silence and inaction of the grantor or landlord. The tenant on condition is bound to know that what he is doing is a breach involving forfeiture, and to require a warning from the landlord or grantor of that fact would be unreasonable and absurd.

1. Instances of such conditions appear in *Ludlow v. N. Y. & Har. R. Co.*, 12 Barb. (N. Y.) 440; *Uppington v. Corrigan*, 151 N. Y. 143; *Hayden v. Inhabitants of Stoughton*, 5 Pick. (Mass.) 528.

A condition that the tenant shall not assign without the consent of the landlord is construed as binding the original tenant only, not his assignee after an assignment made with the landlord's consent, and is therefore capable of only a single breach. *Koehler & Co. v. Brady*, 78 Hun (N. Y.) 443; *Murray v. Harway*, 56 N. Y. 337; *Gannett v. Albree*, 103 Mass. 372.

to make alterations, not to commit waste, and the like. Such conditions are capable of many successive breaches, and the waiver of a breach simply destroys the right to enter for that particular breach, without in any way affecting the right to enforce a forfeiture for any breach thereafter committed.² (c) Conditions calling for the maintenance of the premises in some specified way, or for some stated purpose, such as a condition to keep the buildings on the premises insured, or in repair, or to use the premises solely for the purposes of a private dwelling for the tenant and his family. In these cases if the buildings are permitted to remain uninsured or out of repair, or if the premises are used in a continuous way for business purposes there is a continuing breach of condition or cause of forfeiture in each case as long as the forbidden condition lasts. Therefore in any such case if rent be accepted with knowledge of the breach, or the breach be waived in any other way, the waiver applies only to the continuing breach up to the time of the waiver. It is not a license permitting a further continuance of the forbidden condition for the balance of the term. Therefore if after the payment of rent or other act of waiver the tenant still fails to make repairs which are needed, or to take out insurance, or continues to use the premises for the purposes of business, he is guilty of a further breach of condition which has not been waived or consented to, and the landlord may enter or oust him for breach of condition.³

2. *Conger v. Duryee*, 90 N. Y. 594; *Wend. (N. Y.)* 530; *Croker v. Old Ireland v. Nichols*, 46 N. Y. 413; *South Soc.*, 106 Mass. 489; *Jones v. Bleecker v. Smith*, 13 *Wend. (N. Y.)* 530; *Croker v. Old South Soc.*, 106 Mass. 489; *Douglas v. Herms*, 53 Minn. 204. See, also, cases cited, § 228, note 9, *ante*.

3. *Ambler v. Woodbridge*, 3 *Barn & Cres.* 376; *Alexander v. Hodges*, 41 Mich. 691; *Bleecker v. Smith*, 13 *Wend. (N. Y.)* 530; *Croker v. Old South Soc.*, 106 Mass. 489; *Jones v. Durrer*, 96 Cal. 95. In *Conger v. Duryee*, 90 N. Y. 594, the court by way of dicta criticises this rule, or rather the form in which it is expressed, stating that every breach of such a condition necessarily involves some specific act or omission. The point was not involved, as the

§ 230. **License Permitting Breach of Condition.**—A license is a consent in advance to commit a breach of condition given by the landlord, grantor, or other person entitled to enforce the condition, to the tenant or owner of the conditional estate. The effect of it is exactly the same as the effect of a waiver of a breach—no forfeiture can be enforced for a breach of condition thus consented to.⁴ Some confusion was introduced into the law on this subject by the celebrated *Dumpro's Case*,⁵ in which the court held that

breach in that case was the tenant's specific failure to pay taxes for certain stated years, waived by the subsequent acceptance of rent. The continued failure to comply with such conditions as are referred to in the text constitute a continuing breach from day to day, forbearance and waiver of forfeiture by the landlord not amounting to a consent or license that the tenant neglect the performance of the duty imposed upon him by the condition thereafter.

In *Smith v. Rector, etc. St. Philip's Church*, 107 N. Y. 610, land was leased for a term of twenty-one years subject to a condition not to assign or sublet. The tenant erected an apartment house for the express purpose of subletting apartments to subtenants, and rents were accepted for several years by the landlord with notice of the subletting of apartments. The court regarded these sublettings as not within the meaning of the condition, which seems to have related to the land, and not to any building erected thereon, the land having been leased with the express purpose of erecting the building, which was to be appraised and paid for by the lessor at the end of the term. But even if these sublettings were in violation of

the covenant the court regarded the acceptance of rent for years with knowledge of the situation as a license to continue the subletting of apartments for the balance of the twenty-one year term.

In *Thropp v. Field*, 26 N. J. Eq. 82, there is dicta to the effect that where the landlord has habitually permitted the tenant to be remiss in the payment of rent it would be inequitable to enforce a forfeiture for a subsequent failure to pay rent on time. In any event the tenant is relieved from the forfeiture on paying the full amount of the rent, with interest. On the other hand, in *Douglass v. Herms*, 53 Minn. 204, the court held that subsequent breaches by failure to pay rent and taxes were not affected by the landlord's permitting the tenant to be in default in former payments, or by the landlord's paying the taxes himself on former occasions. That the waiver of former breaches will not amount to license to repeat breaches of the condition thereafter is the general and sounder rule. *Boscowan v. Bliss*, 4 Taut. 735.

4. See cases in notes following.

5. 4 Coke, Rep. 119, 1 *Smith's Lead. Cas.* 47, 51 *et seq.*

where land had been leased to a tenant on condition that neither the tenant nor his assigns should assign the term without the consent of the landlord, the giving of such consent to the tenant and his assignment thereunder destroyed the condition altogether, so that the assignee and subsequent assignees could assign at pleasure without the landlord's consent. This surprising holding was based on the alleged reason that a condition is indivisible, and therefore if a single breach is consented to the condition is gone altogether. That the reason on which the case is decided is contrary to the fact is sufficiently apparent. Where the condition is capable of successive breaches, or of a continuing breach, we have already seen that each separate breach may be waived without in any way affecting the right of forfeiture for further breaches committed after the waiver.⁶ Such conditions are in no sense inseverable, and *Dumpor's Case* never had any reason to support it. It became established as law, however, by precedent, though the later cases usually pointed out the fallacy of the reasoning on which it was decided.⁷ The rule in *Dumpor's Case* was expressly done away with by statute in England in 1851, and it has been generally repudiated in most of the states of this country in which the question has been raised.⁸ In a few cases, however, the rule has been recognized here, though for the most part by way of *dicta*.⁹ In New York there is

6. See § 229, notes 2 and 3.

7. *Brummel v. Macpherson*, 14 Ves. 173, and cases in following notes.

8. 22 & 23 Vict. ch. 25, §§ 1-3; *Kew v. Trainer*, 150 Ill. 150. See notes after *Dumpor's Case* in 1 *Smith's Lead. Cas.* 47-51, containing a valuable discussion of this point, and showing that the rule has not been adopted in more than one or two states, and has been either repudiated or ignored generally in the other states in which the question has been raised.

9. *Sharon Iron Co. v. Erie*, 41 Pa. St. 341 (the court holding that the releasing of the plaintiff from a condition to build a foundry on the land in question, a bloomery to be built instead, destroyed the condition altogether, so that a forfeiture could not be enforced because of failure to build the bloomery, on the authority of *Dumpor's Case*); *Pennock v. Lyons*, 118 Mass. 92 (referring without discussion to *Dumpor's Case*, and decided on the authority of *Gannett v. Albee*, 103 Mass. 372, in both cases the

dicta that Dumpor's Case is still the law, *dicta* which was entirely uncalled for in the decision of the cases in question.¹⁰ Cases sometimes cited as sustaining the rule¹¹ are cases in which the lease provided that the *tenant* should not assign without the landlord's consent, not that the tenant *and his assigns* should not so assign. Because of the tendency of the courts to construe conditions most strongly against forfeitures the courts have held, in New York and

condition being that the tenant should not assign, the latter case being decided expressly on the point that this condition was not intended to bind the assignee, and the first assignment having been consented to, the condition was gone since it was capable of but one breach, viz.: by the assignment which had been consented to, so that a further breach was impossible); *Reid v. Weissner Brew. Co.*, 88 Md. 234, the condition being that the *tenant* should not assign, there being no restriction on assignments by assignees).

10. In *Dakin v. Williams*, 17 Wend. 447, 458, in an action on a covenant involving no question of conditions or forfeiture, after criticising Dumpor's Case the court said: "The law, however, of this case is well settled and we do not intend to disturb it." In *Williams v. Dakin*, 22 Wend. 201, 209, there is another dictum of the same kind.

11. In *Murray v. Harway*, 56 N. Y. 337, and *Kohler & Co. v. Brady*, 78 Hun (N. Y.) 443, the condition was that the *tenant* should not assign without the landlord's consent, but with no restriction on the assignee. In holding that, the assignment having been consented to before or after it was made either by way of license or waiver, the condition was at an

end, the court cites Dumpor's case without a discussion of that decision or of its application to these cases. As in the Massachusetts cases and the Maryland case, cited in the preceding note, the condition in these cases was susceptible of only a single breach—an assignment by the original tenant—and that having been consented to or waived, no further breach was possible and the condition was at an end. These cases *must* have been decided on that ground, since it is well settled by an abundance of authority in New York and elsewhere that the *waiver* of a breach of condition capable of many successive breaches has no effect on the right to enforce a forfeiture for a subsequent breach. See cases cited in § 229, notes 2 and 3, particularly *Ireland v. Nichols*, 46 N. Y. 413, and *Bleecker v. Smith*, 13 Wend. 530, the court holding in both cases that the acceptance of rent waived breaches of a condition not to sublet up to that time, without any effect on the right of forfeiture for further subletting. That the sublessee in such case would have no right to sublet in turn. See *Wertheimer v. Hosmer*, 83 Mich. 56, this case, also citing Dumpor's case, but being directly opposed to it in its holding.

elsewhere, that this provision does not forbid assignments by assignees, and therefore if the first assignment is consented to, the term may be reassigned at pleasure, the lease in no way forbidding assignments by assignees, since they are not included in the prohibition. In other words the condition is capable of only a single breach, and when that is consented to the condition is gone, as explained in the preceding section. Since *Dumpor's Case* never was supported by any valid reason, and has always been criticized by the English courts even when they followed it, and since it has been expressly repudiated by statute in England and by statute or decision in most states in this country in which the question has arisen, we may safely say that it is not law in New York, though there be some *dicta* of slight importance to support it.

§ 231. Relief From Forfeiture in Equity.—Where the condition calls simply for the payment of money or the giving of money's worth capable of exact computation, the evident purpose of the condition is to enforce the payment, and if the landlord or grantor, after breach, receives the full amount with interest during the period of delay, he receives all that he is equitably entitled to, interest being compensation for the delay. For this reason equity will relieve a tenant from a forfeiture incurred by a failure to pay rent, taxes or the like, the tenant tendering the amount due, with interest to the date of tender, and keeping his tender good by depositing the amount in court. In most jurisdictions this may be set up as a defense to the landlord's or grantor's action to enforce the forfeiture, or an action may be brought by the tenant in equity for this relief. In these cases the cause of the tenant's failure to pay on time is immaterial, and mistake, fraud, duress or the like need not be shown, the tenant being entitled to relief in any event, on the same theory that a mortgagor is entitled to redeem his land from a forfeiture incurred through failure to pay the mort-

gage debt when due, viz.: that the condition is held by way of security to enforce the payment, and the landlord is entitled only to such payment in full, with interest as compensation for the delay.¹

In other cases of conditions calling for the performance of same act involving something more than the payment of a sum of money, such as the keeping of the premises insured for the benefit of the landlord, no relief will be granted to the tenant or grantee unless it appear that a breach has been innocently and unintentionally committed, without any harm actually resulting to the landlord or grantor, the breach being explained as arising out of accident, mistake, fraud or surprise. In such case if the tenant on condition subsequently performs the condition in so far as he can on discovering the breach, no harm having resulted because of the unintentional breach, equity will relieve him from the forfeiture so incurred, though it call for an act not involving, or involving something more than, the payment of money.²

§ 232. Illegal and Impossible Conditions.—Conditions impossible of performance or breach and conditions which call for the doing of some illegal act are simply void and of no effect as conditions subsequent. The estate which vests in a grantee, devisee or tenant for years subject to such a condition is not, in fact, conditional, since the contingency on which forfeiture may be incurred can never take place. If compliance with the condition is impossible there can be no breach or default on the part of the tenant. Thus if the condition is that the grantee or devisee support a person named, and the person so named dies before or after the

1. *Giles v. Austin*, 62 N. Y. 486; *Day Min. Co. v. Wakefield*, 72 Wis. 204; *Donnelly v. Estes*, 94 Wis. 390. *Noyes v. Anderson*, 124 N. Y. 175; *Grigg v. Landis*, 21 N. J. Eq. 494; *Thropp v. Field*, 26 N. J. Eq. 82; *Walker v. Wheeler*, 2 Conn. 299; *Rogan v. Walker*, 1 Wis. 527; *Sunday* Min. Co. v. Wakefield, 72 Wis. 204; *Donnelly v. Estes*, 94 Wis. 390. 2. *Mactier v. Osborn*, 146 Mass. 399; *Henry v. Tupper*, 29 Vt. 358; *Story Equity Jurisdiction*, § 1323.

deed or will takes effect, the grantee or devisee thereafter holds an estate free of the condition, which was made impossible of performance by the death of the person to be supported.³ The same result follows if the condition calls for an act which is physically impossible, such as a condition that the grantee go to Rome within twenty-four hours, that he marry a woman who dies, or the like.⁴ The principles governing the enforcement of contracts impossible of performance apply to conditions subsequent in deeds or wills. A condition, like a contract, is not impossible if it were possible to perform it or to comply with it when made, but performance is prevented in the specific case because of labor strikes, destruction of a building by fire shortly before completion, the erection of which by a certain date is required by the condition, or by financial reverses or other happenings which render performance very difficult. The contractor in such cases undertakes the performance of a contract possible of performance, and he assumes the risk of accidents or misfortunes which may render performance by him on time very difficult or actually impossible.⁵ The grantee or devisee takes the same risk. If he fails to perform a possible condition his estate is subject to forfeiture no matter what accidents or misfortunes may have been instrumental in preventing performance.⁶ But if the grantor or other person entitled to enforce the condition is himself responsible for the failure to perform, he cannot enforce a forfeiture on that account because the breach was caused by his own act or fault. So where the condition required the erection of a building by a given date, and

3. *Parker v. Parker*, 123 Mass. 584; *Reed v. Hatch*, 55 N. H. 327; *Hoss v. Hoss*, 140 Ind. 551; *Morse v. Hayden*, 82 Me. 227. In these cases where death of the person to be supported occurs after the estate has arisen, the supporting of such person until his death is complete performance, all

that could have been intended, and this question is not involved.

4. See examples given in Co. Litt. 206a; 2 Bl. Com. 156.

5. Pollock, *Contracts* (6th ed.), 410, 418; *Harmony v. Bingham*, 12 N. Y. 99.

6. See notes 3 and 4, *supra*.

the grantor wrongfully interrupted the erection of the building, so that it was not erected on time, he could not enforce a forfeiture. The grantor's wrongful act, however, did not relieve the grantee from the necessity of erecting the building, it merely extended the time for performing the condition, giving to the grantee a reasonable time in which to perform in view of the delay caused by the grantor.⁷

If a condition precedent be illegal or impossible no estate passes, since the estate cannot vest until the performance of the condition, which can never take place.⁸ The conditional estate in such case is absolutely void.

§ 233. Illegal Conditions.—These include conditions calling for the doing of some act expressly forbidden by law,

7. *Baker v. Woman's Chr. Temp. U.*, 57 App. Div. (N. Y.) 290.

In *Davis v. Gray*, 16 Wall (U. S.) 203, the existence of a state of war in Texas due to the seceding of Texas from the Union made performance of the condition impossible temporarily, but the court held that the tenant on condition was required to perform within a reasonable time after peace was restored.

In *Reed v. Hatch*, 55 N. H. 327, the condition was that a mill be maintained on the premises for manufacturing, the court held that on the burning of the mill it should have been rebuilt within a reasonable time.

8. Co. Litt. 206a, 206b, 118a; 2 Bl. Com. 156; *Cassem v. Kennedy*, 147 Ill. 660; *City of Stoughton v. Weber*, 98 Cal. 433.

Suppose a condition precedent is made impossible of performance by act of the grantor or other person entitled to the property in case the estate on condition precedent should fail. If the intent was that the es-

state should vest should performance of the condition subsequently become impossible, which seems to have been the basis of the decision in *Jones v. Ches. & C. R. Co.*, 14 W. Va. 514, 523, the estate would take effect though the condition had become impossible of performance without fault on the part of the person to whom the estate had been given. But in the absence of such intent, in the case of a gift by deed or will of a future contingent estate, it is difficult to see how the estate could ever vest unless the condition is complied with. In the case of a conveyance of such an estate for a consideration it is clear that the grantor or one claiming through him would be estopped from setting up non-performance of the condition which was caused by his act. But in the absence of facts sufficient to give rise to an equitable estoppel title cannot vest without performance of the condition, that being the expressed intention of the grantor or testator.

as the commission of a crime,⁹ or some act contrary to public policy. Conditions in general restraint of marriage in conveyances or devises of land are against public policy, and are therefore void.¹⁰ But a condition in reasonable restraint of marriage is valid, such as a condition not to marry until attaining the age of twenty-one or twenty-five, or a condition not to marry a certain definite person, or a person of a certain religion, or inferior race or the like.¹¹ A condition restricting marriage generally until attaining the age of fifty, or more, would be unreasonable and void, tending to defeat reproduction and therefore contrary to public policy.¹² A condition restricting marriage without the consent of the father, mother or guardian of the grantee or devisee is reasonable and therefore valid.¹³ A husband may grant or devise property to his wife, and the wife to the husband on condition that she or he, as the case may be, do not remarry. It is not against public policy that provision for the surviving wife or husband cease upon remarriage.¹⁴

An estate upon limitation to a grantee or devisee until marriage, then over to others, is generally sustained, the intention being to provide for the grantee or devisee until marriage only.¹⁵ In such case there is no intent to prevent

9. Co. Litt. 206b, and cases in notes following. Eq. 229 (dicta); Phillips v. Medbury, 7 Conn. 568.

10. Hogan v. Curtin, 88 N. Y. 162; Randall v. Marble, 69 Me. 310; Shackelford v. Hall, 19 Ill. 212; Graydon's Exrs. v. Graydon, 23 N. J. Eq. 229. It has also been held that the general prohibition of a second marriage is reasonable and not contrary to public policy though made by a parent or other person in his deed or will, not by the husband or wife of the grantee or devisee. Allen v. Jackson, 1 Ch. Div. 300; Herd v. Carton, 97 Tenn. 662.

11. Hogan v. Curtin, 88 N. Y. 162; Graydon's Exrs. v. Graydon, 23 N. J. Eq. 229; Shackelford v. Hall, 19 Ill. 212; Phillips v. Ferguson, 85 Va. 509. 15. 4 Kent Com. 127; Moody v. Rennoldson, 2 Hare 570; Parsons v. Winslow, 6 Mass. 169, 181; Randall v. Marble, 69 Me. 310; Hoyt's Est., 38 Pa. St. 422 (gift to son's wife or

12. See cases in preceding note.

13. Hogan v. Curtin, 88 N. Y. 162.

14. Giles v. Little, 104 U. S. 291; Knight v. Mahoney, 152 Mass. 523; Graydon's Exrs. v. Graydon, 23 N. J. Eq. 229.

marriage, and no restriction thereon, though as a practical matter in a gift to a daughter by her father the distinction is a shadowy one between a provision that her estate shall be forfeited in case she remarry and a provision that she shall take the property *until* her marriage. In each case marriage ends or may end the estate if the provision be given effect, and the temptation to refrain from marriage would seem to be the same in both cases.¹⁶ A condition calling for the separation of husband and wife, or that one live apart from the other is manifestly void as against public policy.¹⁷ If the wife is already separated from her husband provision for her "during her separation" is valid.¹⁸

A condition in absolute restraint of alienation is void as against public policy, and as being repugnant to the estate granted.¹⁹ A partial restraint of alienation, preventing alienation to specified persons or for specified purposes will be valid.

A condition repugnant to the nature of the estate granted, such as a condition that the grantee shall not use the property or take profits therefrom is void as against public policy,²⁰ as is a condition in illegal restraint of trade.²¹

widow until remarriage, then over to others); *Courter v. Stagg*, 27 N. J. Eq. 305.

16. If the limitation is intended to unreasonably restrain marriage it should be held void, like a condition in the same case; if intended as a provision until marriage, not operating as an unreasonable restraint thereof it is valid. *Jones v. Jones*, 1 Q. B. Div. 279. See 6 Gray's Cases Prop. 23 note.

17. *Wilkinson v. Wilkinson*, L. R. 12 Eq. Cas. 604; *Conrad v. Long*, 33 Mich. 78.

18. *Cooper v. Remsen*, 5 Johns. Ch. (N. Y.) 459.

In *Cooper v. Classon*, 3 Johns. Ch. 521, involving a similar provision for

the wife's support during her separation from her husband, the court held that the wife could not become entitled to it by wrongfully separating from her husband. As to whether she would be entitled in case of an involuntary separation, *quære*. It would seem that in such latter case she would be entitled, the provision being valid if construed as providing for her in case of a separation for which she was not responsible, the limitation in no way tending to bring about a separation.

19. Gray Restraints on Alienation.

20. Co. Litt. 206b; Cruise Dig. tit. XIII, ch. 1, §§ 20, 21.

21. Cruise Dig. id. § 19; *United States v. Freight Ass'n*, 166 U. S. 290.

§ 234. **Estates Upon Limitation and Conditional Limitation.**—An estate upon limitation in fee arises where land is conveyed or devised to a person and his heirs but subject to a limitation which is future and contingent, on the happening of which the estate is to end by the express terms of the instrument creating it. A grant or devise to A and his heirs *until* B returns from Rome, *so long as* St. Paul's Cathedral shall stand, *until* Gloversville is incorporated as a village, are illustrations. The estate is to continue only until the happening of the contingent event which limits it; it then comes to an end of itself because by the express terms of the provision creating the estate it is to continue only up to that time. The grantor in such case has what is termed a possibility of reverter; if the contingency on which the limitation depends happens the fee reverts back to him as completely as though he had never conveyed it away, without entry, the starting of ejectment or any other act on his part. There is no forfeiture or destruction of the estate as a penalty for breach of condition, as in the case of conditional estates. An estate on limitation ends on the happening of the limitation because its natural end, provided for in its creation, has been reached.¹

This possibility of reverter cannot be assigned or devised any more than the possible right of entry for breach of condition, and for the same reasons. It is in no sense a reversion, is therefore not an estate either present or fu-

In Michigan and Wisconsin statutes have been enacted providing that frivolous restrictions upon the use of land resulting in no benefit to any person or to the public are void. Comp. L. Mich. 8828; Wis. St. of 1898, § 2070; *Barrie v. Smith*, 47 Mich. 130.

1. Co. Litt. 214b; 2 Bl. Com. 109; 4 Kent Com. 127; Gray Perpetuities, § 13, and cases in notes following. These estates were called base

or qualified fees by Blackstone and other writers, and they are still so designated occasionally. They are also called estates upon collateral limitation by some authorities, though the word "collateral" seems to add nothing. Where on the happening of the future contingent event the fee is granted or devised over to another the estate is called a conditional limitation. See § 235, *post*.

ture, and is no more affected by statutes making future contingent estates transferable and devisable than is the possibility of entry for breach of condition.² It passes on the grantor's death to his heirs as does the possibility of entry just referred to.

Estates upon limitation like conditional estates, may also be in tail, for life or for years, as an estate during widowhood, an estate for fifty years if the grantee lives that long, an estate for the life of the grantor so long as the premises are used for the manufacture of cheese, and the like.³ On the happening of the limitation the estate in tail, for life or for years ends at once, the property reverting

2. Challis Real Prop. (2d ed.), 73, 201; 1 Preston, Estates, §§ 50-53; 2 Fearn's Cont. Rem., Smith's ed., §§ 153, 154; Gray Perpetuities, § 13; North v. Graham, 235 Ill. 178.

That the possible right of entry may be assigned is held in *Siegel v. Lauer*, 148 Pa. St. 236. In England and in those states providing by statute for the assignment of future contingent interests of all kinds, including possible rights of entry and of reverter, the possible right of reverter may be assigned. See § 226, note 2, *ante*.

There seems to be no good reason why the statutes in the different states which provide that contingent remainders and future executory interests may be assigned, inherited or devised should not apply to these possibilities of reverter. Assuming that the grantor or deviser was allodial owner of the property at the time of the grant or devise, the possibility of reverter remaining in him differs in no material respect from a future executory interest created as a conditional limitation in case the prop-

erty is limited over to a third person on the happening of the contingency. On the happening of the limitation the property immediately vests in the grantor or the heirs of the deviser exactly as it would in the third person if the estate were a fee upon conditional limitation. The possibility of reverter differs from a possible right of entry for breach of condition, the latter being a mere possible right of action, not a contingent estate, the property not reverting until entry or the starting of ejectment.

3. *Roseboom v. VanVechten*, 5 Denio (N. Y.) 414, 424; *Hurd v. Cushing*, 7 Pick. (Mass.) 169; *Warner v. Tanner*, 38 Oh. St. 118.

Tenancies for years subject to termination at any time at the option of either party on notice, or in case the property should be sold, are illustrations of tenancies for years upon limitation. *Pratt v. Paine*, 119 Mass. 439; *Miller v. Levi*, 44 N. Y. 489; *Woodbridge v. Hires Co.*, 19 App. Div. (N. Y.) 128; *Johnston v. King*, 83 Wis. 8; *Taylor v. Frohock*, 85 Ill. 584.

back to the grantor without entry or any other action on his part, exactly as in the case of an estate upon limitation in fee.⁴ In these cases the grantor has a reversion, and a conveyance or devise of the reversion necessarily carries with it the possibility of reverter in case the particular estate upon limitation comes to an end through the happening of the limitation. It may be added that on the conveyance or assignment of the estate upon limitation, whether in fee, for life or for years, the grantee or assignee takes it subject to the limitation, since the tenant upon limitation can convey no greater estate than is his to convey.

It has been asserted by Mr. Sanders, Prof. Gray, and other writers of authority that there can be no such thing as an estate in fee upon limitation and its attendant possibility of reverter because of the statute *Quia Emptores*, which statute did away with subinfeudation, and therefore with tenure as between grantor and grantee, the argument being that the possibility of reverter is an incident of tenure, that such right cannot exist without tenure, and as tenure no longer exists between a grantor and grantee in fee because of the statute, the attempted possibility of reverter is void and an absolute fee simple passes.⁵ If we admit the premise that tenure is essential to this estate the conclusion arrived at in this argument cannot be avoided, assuming that the statute should be construed as including fees on limitation, or base fees, as well as estates in fee simple absolute.⁶ The weight of authority is overwhelmingly against this position, most of the leading writers on the law, ancient and modern, recognizing estates upon limitation in fee, or base fees as valid estates, and the lead-

4. See preceding note.

5. Gray Perpetuities (2d ed.), §§ 20-42 (containing an able analysis of the cases and statutes bearing on this question); 1 Sand. Uses, 5th ed., 208; 1 Leake, 36 and note (d).

6. See article by Mr. Challis, 3

Law Quarterly Rev., to the effect that the statute *Quia Emptores*, applying in terms to estates in fee simple only, was not intended to apply to base or qualified fees, and in such cases tenure was not affected.

ing courts in this country taking the same view both by way of decision of binding authority as well as by dictum.⁷ On the other hand there seems to be no decision in this country which sustains the principle that a limitation on a fee is void because of the absence of tenure between the grantor and grantee.

In England tenure still exists theoretically between the king and the owner in fee. It does not exist between the owner in fee and any private person because of the statute *Quia Emptores*, except where such tenure existed before 1289, the date of the enactment of that statute, and the cases in which such tenure can be established as existing prior to that date in the predecessors in interest of the present owner in fee of any parcel of real property are very few in number. Even in England, therefore, as a practical matter, tenure is of very slight significance at this time. In this country either tenure does not exist because of provisions of state constitutions or statutes, or it exists as a matter of theory only between the state and the owner in fee. In those states where it exists theoretically all incidents of tenure have been abolished or have disappeared, so that the owner in fee holds exactly as though he were the allodial owner, the theoretical tenure referred to having no practical significance whatever.⁸ Therefore, no matter in what state the question may arise, it should be decided on the basis that the owner of the fee holds by allodial ownership.

In dealing with the allodial ownership of to-day we must not be influenced by doctrines growing out of tenure and the feudal relation. We must approach the problem as though tenure and feudalism never existed. The fundamental law of ownership is that the owner may do as he pleases with

7. *Leonard v. Burr*, 18 N. Y. 96; N. J. L. 13; *Board of Education v. First Universalist Soc. v. Boland*, 153 Mass. 171; *Siegel v. Lauer*, 148 Pa. St. 236; *Friedman v. Steiner*, 107 Ill. 129, and note 1 *supra*.
 125; *North v. Graham*, 235 Ill. 178; 8. See § 77 *ante*.
Morris Canal, etc. Co. v. Brown, 27

his property, subject to the rights of society, and among other things he may convey his property as he pleases, his intent controlling as expressed in his deed or will. His intent should control in the case of an estate in fee upon limitation as in others, and on the happening of the event the estate should end in accordance with the terms of the instrument creating it. Quite apart from tenure, it would be in violation of every principle of ownership to hold that the property would not then become his again. Certainly the grantee cannot claim it, since the intent was clear that his interest should cease on the happening of the limitation, and no one else would have any basis of claim whatever.

The only practical reason for the rule contended for by Prof. Gray is that it is necessary in order to prevent the creation of future remote interests which may not become vested for generations, since the limitation may be one which may not happen for hundreds of years, it being settled under the cases that the rule against perpetuities does not apply to possibilities of reverter, because they existed under the common law before the rule against perpetuities developed. But contingent remainders were valid before the rule against perpetuities arose, nevertheless they are now subject to the rule.⁹ The possibility of reverter differs from a right of entry for breach of condition—it is something more than a possible right of entry. On the happening of the limitation the estate immediately passes to the grantor or his heirs, just as an estate upon conditional limitation passes to the person to whom it is limited. In all cases of allodial ownership, therefore, there is no valid reason for denying the existence of estates upon limitation, and no valid reason why the rule against perpetuities should not apply to the possibility of reverter in the grantor. It should be an interest which will certainly vest within lives in being and twenty-one years, and the error in the cases

⁹. See Ch. XV, *post*.

arises in refusing to extend the rule against perpetuities to these future contingent interests, not in recognizing their existence.

§ 235. **Estates Upon Conditional Limitation.**—A full consideration of these estates, their creation and incidents, belongs to the chapter on future estates.¹ Where property is conveyed or devised to A and his heirs, but if A should die without issue, or should marry X, or on the happening of any contingency in the future (subject to the rule against perpetuities) then the property is granted or devised over to B and his heirs, an estate upon conditional limitation is created. The term applies to the estates of A and B in this relation to one another, A's estate being subject to termination on the happening of the contingency, and B's estate being subject thereto as a condition precedent. As we will see, this estate could not be created at common law before the Statute of Uses and the Statute of Wills, both enacted during the reign of Henry VIII. Since those statutes a conditional limitation has been valid as a legal estate when created by will as an executory devise, or by deed under the Statute of Uses as a shifting use.²

A distinction of some importance between estates upon limitation, followed by a conditional limitation over to another, and the usual estate upon conditional limitation, should be considered here. If property be given to Bailey in fee until Gloversville is incorporated as a village, then over to Gloversville, Bailey's estate comes to an end, and the property reverts to the heirs of the testator, the gift to Gloversville being void, as violating the rule against perpetuities, since Gloversville may not be incorporated as a village for hundreds of years, so that its interest may not vest within lives in being and twenty-one years, or within two lives in being under the New York rule. If the

1. See Ch. XIII, *post*.

2. See Ch. XIII, *post*.

property had been devised to Bailey in fee, with the provision that on the incorporation of Gloversville as a village the property should go over to Gloversville, Bailey would have a fee absolute, since his estate could be defeated only by the taking effect of the second fee as a valid estate, but that being void, Bailey's estate could not be defeated and would therefore be absolute. In the first case the language of limitation used made Bailey's interest an estate upon limitation which necessarily came to an end when its natural end was reached on the incorporation of Gloversville, that being the clear intent, irrespective of the invalidity of the second fee.³

3. *Leonard v. Burr*, 18 N. Y. 96;
First Universalist Soc., etc. v. Bo-
land, 155 Mass. 171.

CHAPTER XIII.

FUTURE ESTATES.

§ 236. **The Different Kinds of Future Estates.**— An estate which gives to its owner the present right to the future possession and enjoyment of real property is a future estate. The owner of land may divide his entire fee, which will continue or may continue forever, into as many parts as he pleases, transferring the different parts to different persons as he may elect. Thus A, the owner in fee, may lease his farm to B for ten years, and subject thereto he may convey the farm to C for life, remainder to D for life, remainder to E in fee tail, remainder to F in fee simple. During the ten year term B is owner of the land, entitled to its exclusive possession and control. All the others have successive future estates in the farm, the balance of the fee over and above the tenancy for years being divided among them in the order stated. Each one is the present owner of his future estate, an incorporeal interest since it gives him no present ownership and control of the farm, it being only an incorporeal right to the future possession and control of the land. When the tenancy for years ends, C, the owner of the first life estate becomes owner of the farm, having the right to exclusive possession and enjoyment thereof during his life. On his death D, the owner of the second life estate, becomes owner of the farm, if he be still alive. If D should die before the death of C his life estate in remainder would end, so that he would never come into the possession and enjoyment of the property. On the death of C and D the ownership of the farm passes to E in fee tail, his incorporeal future estate being changed into a present estate in possession. If E or his descendants should die without issue surviving the estate tail ends and F, the final remainderman in fee simple, becomes absolute owner

in possession and enjoyment. The actual ownership of the land as a physical thing is always in the owner of the present estate, those entitled in remainder being the owners of future incorporeal estates in the land giving no present ownership but only rights of future ownership.¹

If, in the above illustration, A retained the balance of the fee in himself after creating any one or all of the precedent estates for years, for life, or in fee tail, the future estate remaining in him is called a reversion. The distinguishing characteristics of reversions and remainders are discussed in the sections following.²

Future executory interests created to arise in possession and enjoyment on the happening of a future event independent of any particular precedent estates are of the same general nature. They give to their owners a present right to the future possession and enjoyment of the property on the happening of the event on which they are limited to take effect in possession, intangible and incorporeal interests during the interval because they give no present right of ownership in the land. An estate to A to arise on his marriage, or on the death of B; an estate to B and his heirs, but if B should die without issue then to A and his heirs, are illustrations of such interests. Under the ancient common law they could not be created as they violated technical rules which arose out of feudalism, but since the reign of Henry VIII they have been valid when created by will or by deed under the Statute of Uses. They will be discussed in detail later.³

Rights of entry for breach of condition, actual or possible, are merely rights of action, not estates. Possibilities of reverter after estates in fee upon limitation are also regarded as mere possibilities not amounting to estates. As

1. See discussion of ownership of land, and of incorporeal interests therein in Chapter I, *ante*, also § 238, *post*.

2. §§ 237, 238, *et seq.*, *post*.

3. See §§ 250, 251, *post*.

pointed out heretofore⁴ there would seem to be no valid reason for applying different rules to possible rights of reverter from those which are applied to other future executory interests dependent upon the happening of some contingent event. These interests are heretofore discussed in detail.⁵

§ 237. **Reversions.**— Whenever the owner of an estate in land creates therefrom and transfers to another a lesser estate, the interest remaining in him is called a reversion. It is called a reversion because by virtue of it the land “comes back” or reverts to the grantor or lessor on the termination of the smaller estate so created in another.⁶ Thus where the owner in fee lets the land for a term of years, or conveys it to another for life or in fee tail, the balance of the fee undisposed of by him is a reversion, necessarily remaining in him because not disposed of by him, arising by operation of law from the creation of the particular estate (so called because a *particula*, particle, of the fee) rather than by his voluntary act. So, also, a tenant for years who sublets for part of his term, and a tenant for life who lets the premises for a term of years, retain as reversions the balance of the term or life estate remaining in them. A reversion is necessarily a vested interest, the grantor or lessor remaining vested of so much of his estate as he has not disposed of. A reversion, like any other vested interest, may be conveyed or assigned, devised or inherited as freely as an estate in possession.⁷

It should be remembered that where a final remainder in fee is contingent the balance of the fee over and above the precedent particular estates is in the grantor or the heirs of

4. Ch. XII, *ante*.

5. Ch. XII, *ante*.

6. 2 Bl. Com. 165; Digby Hist. L. Real Prop. (5th ed.), 259, 260;

Williams Real Prop. (17th ed.), 385, *et seq*.

7. Co. Litt. 49a; 2 Bl. Com. 175, 317; 4 Kent Com. 354; Gray, Perpetuities (2d ed.), § 113.

the devisor as a reversion, subject to be divested by the vesting of the remainder on the happening of the condition on which it depends.⁸ A contingent remainder is a mere possibility, not properly an estate.

§ 238. **Remainders.**— Where after creating a particular estate the balance of the fee or other estate of the grantor or lessor is at the same time and by the same instrument conveyed or assigned over to another it is called a remainder. Instead of coming back or reverting to the grantor or lessor the property “remains out” in the remainderman on the termination of the particular estate from which the term “remainder” arises.¹ If after the creating of the particular estate the grantor or lessor convey or assign the balance of his estate to another by a separate instrument, the interest so transferred is a reversion, not a remainder, because on the creating of the particular estate the grantor or lessor becomes the owner of the reversion as a matter of law, and the subsequent conveyance of this interest does not change its character. Having come into existence as a reversion by operation of law it continues a reversion no matter how often transferred.

At common law before the enactment of the Statute of Uses and the Statute of Wills during the reign of Henry VIII, future freehold estates could arise only by way of reversion or remainder, and the only future estates which could be created in any person other than the owner were remainders. A future freehold estate limited to arise at a future time or on the happening of a contingency in the future without a particular precedent estate for life or years or in tail to support it was absolutely void. The reason was that under feudalism the person answerable to the overlord for feudal dues and services was the person seised or

8. Gray, *Perpetuities* (2d ed.), § 11, and authorities cited. Mait. Hist. Eng. L., 21; Williams Real Prop. (17th ed.), 386; Digby

1. 2 Bl. Com. 163; 2 Poll. 8 Hist. L. Real Prop. (5th ed.), 262.

in possession of the property as freeholder. A freehold estate could be conveyed only by livery of seisin or its equivalent, and therefore it was necessary that the grantor, or feoffor as he was termed, part with his seisin in creating any future estate for life or in fee. But the seisin could not vest in the feoffee of the future interest, since by the express terms of the feoffment the seisin or possession was not to be his until the happening of the future event on which his estate was to arise in possession and enjoyment. The result would be, therefore, that if such future estate should be given effect no one would be seised of the property, and no one, therefore, would be answerable for feudal dues and services during the interval elapsing before the taking effect of the future estate. As this would be fatal to the feudal relation it became settled as the invariable rule of law that any future estate which would leave the seisin in abeyance was absolutely void in its creation.² It was necessary that a precedent estate for life or for years be created at the same time, and that the future estate be limited to take effect in possession immediately on the termination of the precedent particular estate, as a remainder. If the future estate was limited to take effect in possession one day or a year or after any other interval following the termination of the precedent estate it was void, since otherwise seisin would be in abeyance during such interval.³

For the same reason a contingent remainder required a

2. Co. Litt. 217a; 2 Bl. Com. 165; 4 Kent Com. 259; Digby Hist. Law Real Prop. (5th ed.), 263; Williams Real Prop. (17th ed.), 417; Buckler v. Hardy, Croke (Eliz.), 585.

For this reason A could not reserve a life estate to himself and convey a remainder for life or in fee to his son, since he could not make livery of seisin to himself. The estate

to his son would be void at common law because an attempt to create an estate to spring up at a future day without a precedent estate to support it. *Sabledowsky v. Arbuckle*, 56 Minn. 475.

3. Williams Real Prop. (17th ed.), 417; 2 Bl. Com. 166, 167; Digby, id. 263.

precedent freehold estate to support it. If limited after an estate for years it was void, seisin otherwise being in abeyance until the happening of the condition precedent on which the contingent remainder depended. A tenant for years is never seised, since he is not the owner of a freehold estate. His possession is that of the first freehold tenant in remainder or reversion, and if the remainder limited after a term of years is vested the remainderman is seised by virtue of the possession of the tenant. But a contingent remainderman cannot be seised because his *right* to the future estate depends on some condition precedent which must happen before his estate becomes certain and therefore vested. Until it vests through the happening of the contingency on which it depends it is a mere possibility, and the possession of the tenant for years is not possession of the contingent remainderman. Therefore a contingent remainder limited to take effect after a term of years was void at common law, since giving effect to such remainders would necessarily put seisin in abeyance until the happening of the contingency on which the remainder depended.⁴

At common law a fee upon a fee, the second fee to take effect on the happening of an event which would bring the first fee to an end, was void, and the first estate in fee in such case was absolute, in no way affected by the happening of the contingency on which it was to end. Thus if land was conveyed to A and his heirs, with the provision that if A should die without issue surviving then the land should go to B and his heirs, B took nothing, the attempted limitation to him being void. A took an estate in fee simple absolute, in no way affected by his death without issue.⁵

4. Williams, *id.* 416, 417; Digby, *id.* 267.

Since a tenancy for years did not require livery of seisin in its creation, such tenants never having seisin, it follows that a tenancy for years

could be created to arise in the future without any precedent estate to support it, the seisin remaining undisturbed.

5. Digby, *id.* 263, 264; 1 Eq. Cas. Abr. 186; 2 Bl. Com. 164; 4 Kent

Though a base or qualified fee, now called an estate upon limitation, was valid at common law, the estate reverting to the grantor or his heirs on the happening of the limitation, the possibility of reverter could not be assigned by him to any one else, and an attempt to provide that on the happening of the limitation the estate should go over to another was equally futile.⁶ In such case as we have seen heretofore, the first fee comes to an end on the happening of the limitation, the land reverting back to the original grantor.⁷ Where, however, the first fee is not a base or qualified fee, no language of limitation being used, but is an estate in fee simple, with a provision that on the happening of a future event the fee should pass over to another, the first fee can be defeated only by the taking effect of the second fee, and as that is void the first fee is absolute.⁸

There was never any valid reason for the rule preventing the creation of a fee upon a fee. The seisin was not in abeyance, since the seisin of the first tenant in fee would continue until the taking effect of the second fee. The reason given for the rule was that when the entire fee was given to the first tenant there was nothing left of the fee to give to anyone else. The rule seems to be an application in an arbitrary way of the rule that future estate could be created only by way of remainder.⁹ This rule is sound from the feudal standpoint where seisin would be put in abeyance by its violation, as in the cases above considered, but there is no sound reason for its application in this instance.

Com. 200; *Blanchard v. Brooks*, 12 Pick. (Mass.) 70; *Hennessy v. Patterson*, 85 N. Y. 91 (dicta).

6. Co. Litt. 18a; see *Proprietors of Church, etc. v. Grant*, 3 Gray (Mass.) 142. See, also, § 235, *ante*.

7. Where the limitation over is void for any reason the estate reverts back to the original grantor or his heirs. See § 235, *ante*.

8. See notes 5 and 6, *supra*.

So, also, where the limitation over is void as a future executory interest created by way of shifting use or executory devise the first fee is absolute, since it can be defeated only by the taking effect of the second fee. *Proprietors of Church, etc. v. Grant*, 3 Gray (Mass.) 142; *Leonard v. Burr*, 18 N. Y. 96; § 235, *ante*.

9. See note 5, *supra*.

If it be argued that the second fee is a mere contingency, and therefore should not be allowed, the answer is that a contingent remainder is also a mere contingency, which is nevertheless valid if it does not cause a suspension of the seisin.

Of the same nature and based on the same reasoning was the common law rule that a future estate could not be limited to take effect on the happening of a contingency abridging or determining the precedent estate before its natural termination. Thus if land was conveyed to A for life, with the provision that if A should marry B the estate should go to C in fee, the provision in favor of C was void since it would take effect only on the marriage of A with B, which event would end A's life estate before its natural termination on A's death. The attempted limitation to C is not a remainder. It is not the balance of the fee on the termination of A's life estate, since on A's death without having married B, the estate of C would not arise. As an attempted future executory interest not created by way of remainder it was therefore void at common law.¹⁰ If the estate had been granted to A for life until A's marriage with B, remainder to C in fee, C would have a valid remainder, since it would take effect on the termination of the preceding life estate either by A's death or by his marriage with B. What was said above with reference to the sufficiency of the reasons for the common law rule that a fee upon a fee was void applies with equal force to the reasons for this rule, the principle involved being the same in both cases.

We shall see that after the enactment of the Statute of Wills and the Statute of Uses, both enacted during the reign of Henry VIII, any one of these interests, void when created by common law conveyances, were good as executory devises when created by will, or as springing or shifting uses when created by deed under the Statute of Uses. A de-

10. Digby, *id.* 264, and note.

tailed consideration of these statutes and their effect belongs elsewhere.¹¹ It is sufficient at this time to understand that after the enactment of these statutes there was no longer any difficulty in creating any future executory interest either by deed or will, without the creation of a particular estate, and in violation of the technical rules above considered. By the modern statutes in New York and several other states each of these interests may now be created by any deed as well as by will, the rules in question being entirely swept away.¹² In other states, since conveyance by livery of seisin is obsolete, and since abeyance of seisin has been in no way material since the termination of feudalism centuries ago, the courts hold that any of these future executory interests may be created by any deed sufficient to convey a freehold estate, the technical rules of the old common law disappearing with the reason for their existence.¹³ There is no sound season why this position should not be taken in all jurisdictions where these ancient rules of the common law have not been abolished by statute. It is difficult to understand why the courts of England or of any state have so long persisted in recognizing these rules as continuing centuries after all reason for them has ceased to exist. The general principle that where the reason for a rule has ceased to exist the rule itself should be regarded as at an end is generally recognized, particularly, as in these cases, where the rule is an arbitrary and senseless interference with the exercise of the rights of ownership. Because these rules have persisted

11. See §§ 250, 251, *post*.

12. N. Y. Real Prop. L., §§ 50, 53. See similar statutes in Michigan, Wisconsin, Minnesota, Indiana, Virginia and California, §§ 1421-1426, Stim. Am. St. Law. See § 252, *post*.

13. *Gorham v. Daniels*, 23 Vt. 600; *Abbott v. Holway*, 72 Me. 298; *Rowland v. Rowland*, 93 N. C. 214; *Sav-*

age v. Lee, 90 N. C. 320; *Sabledowsky v. Arbuckle*, 50 Minn. 475 (the court stating that such executory interests are valid irrespective of the statute); *Bunch v. Nicks*, 50 Ark. 367. See *Boreland v. Marshall*, 2 Oh. St. 308, 313, 314; *Gray, Perpetuities* (2d. ed.), §§ 67, 68, 68a. See, also, § 252, *post*.

so long and are still recognized in many states, it is necessary to treat separately future estates created by way of remainder, vested and contingent, and future estates created as executory interests by way of executory devise or springing or shifting uses.

§ 239. Vested and Contingent Remainders.—A remainder is vested when given to a definite person or class of persons who are ascertained and in whom the remainder may vest, and where it is certain to take effect in possession on the termination of the precedent estate. It is contingent when the person or persons in whom or the event on which it is to take effect remain uncertain. A contingent remainder is an estate on condition precedent. The *right* of the remainderman depends on the happening of a contingency; before this contingency happens he has only a possible right to the remainder on the termination of the precedent estate; on the happening of the contingency his *right* or estate is no longer uncertain, it is vested in him, though the actual enjoyment of the property will be postponed until the precedent estate is ended and the remainder vests in possession. A vested remainder is subject to no uncertainty nor to any condition precedent. The right of the remainderman is vested in him, since he is the present owner of the balance of the fee over and above the particular estate or estates, subject to no condition precedent. His actual enjoyment alone is postponed until the precedent estate ends. His present right or estate in the balance of the fee is in no way uncertain.¹

1. 2 Bl. Com. 168, 169; Gray Perpetuities (2d ed.), § 101, *et seq.*; Williams Real Prop. (17th ed.), 415; Digby Hist. L. Real Prop. (5th ed.), 265, 266, and cases cited in notes following.

It is generally stated that a remainder is vested whenever the re-

mainderman is in existence entitled to take the estate in possession at any moment should the precedent estate come to an end; nothing intervening between him and his possession and enjoyment but the existence of the precedent estate; but where a contingent event must happen in ad-

An estate to A in fee tail remainder to B in fee simple is a good illustration of a vested remainder. The balance of the fee over and above A's estate tail is vested in B, subject to no uncertainty, and therefore subject to no condition precedent. His present right to the future estate in the property on the termination of the precedent estate tail is certain and definite. His actual enjoyment of the property will be postponed until the termination of the estate tail, through the failure of the lineal descendants of the tenant in tail, which may not be until many generations have come and gone. Nevertheless his right is always vested in him, his heirs or assigns, so that he or they will be entitled to the property on the ending of the estate tail. The *right* of the remainderman, not his actual possession and enjoyment, must be certain and subject to no condition precedent in every case of a vested remainder.²

Where a testator devises property to his wife during

dition to the termination of the precedent estate the remainder is contingent. This is correct, it being taken for granted that the remainderman is a definite person concerning whose identity as described in the deed or will creating the estate there is no uncertainty. It is to be criticised, however, as being an arbitrary test having no direct connection and therefore not explaining the essential characteristics of the two kinds of remainders on which the distinction depends. Briefly, a vested remainder or future estate of any kind is one in which the estate of the owner is certain, subject to no condition precedent, while a contingent remainder or other future interest is merely a future possible estate, the right of the remainderman being uncertain and contingent, depending on a condition precedent. The danger of error from following the above

arbitrary test rather than applying the basic distinction in the nature of the two classes of remainders is well illustrated in the New York cases hereafter discussed holding that a remainder to the heirs of one to whom a precedent life estate has been given by the same instrument is vested. See § 241, *post*.

2. *Havens v. Sea Shore Land Co.*, 47 N. J. Eq. 365; *Allen v. Trustees*, etc., 102 Mass. 263; *Dorr v. Johnson*, 170 Mass. 540; *Taylor v. Taylor*, 63 Pa. St. 481.

The N. Y. Real Prop. Law, § 32, changing estates tail into estates in fee simple provides that if a remainder in fee is limited after an attempted estate tail it will take effect as a conditional limitation in case the *first taker* of the attempted estate tail should die without issue surviving.

widowhood, thereafter to his child in fee, the child's remainder is vested. Whether the widow's life estate be ended by her death or her remarriage, in either case the remainder takes effect in possession. The entire balance of the fee, over and above the life estate, is vested in the child from the time the will takes effect; the child's *right* is subject to no condition precedent which must happen before her estate can vest; the only uncertainty is as to the time the remainder will vest in possession and enjoyment, whether on the remarriage or death of the widow. In either case the daughter's right to the remainder is in no way uncertain, and therefore her interest is vested.³

§ 240. Rules of Construction Applying to Deeds or Wills Creating Remainders.—The law favors the vesting of estates, and therefore in case it is doubtful whether the grantor or deviser intended to create a vested remainder or one which was contingent, the doubt will be resolved in favor of the immediate vesting of the estate, though the actual enjoyment will be postponed until the termination of the precedent estate. This is obviously not a presumption, though sometimes so called; it is merely a rule of construction to be applied only in case of doubt. If it is clear that a contingent remainder was intended, the right or estate of the remainderman being subject to a condition precedent, the court must give effect to the intent as expressed in the deed or will.

Thus where land is given to A for life, and "on" or "after" his death to B in fee, B takes a vested remainder, the words "on" or "after" the death of A being construed as referring to the time when the actual possession and enjoyment shall vest in B, his right or estate in remainder vesting in him at once when the deed or will takes effect.⁴ So where a grant or devise is made to A for life,

3. *Green v. Hewitt*, 97 Ill. 113. 496; *Sawyer v. Cubby*, 146 N. Y.

4. *Clark v. Cammann*, 160 N. Y. 192; *Wright v. White*, 136 Mass. 315; *Corse v. Chapman*, 154 N. Y. 470; *Patterson's App.*, 88 Pa. St. 397.

remainder to B if he lives to attain the age of twenty-one, and in case he die before attaining that age then over to others, or to revert back to the grantor or his heirs, the courts construe the remainder as vesting in B at once, subject to be defeated by condition subsequent and to go over or to revert back as the case may be in case of his death before attaining the age of twenty-one.⁵ But a remainder to the children of the life tenant who attain the age of twenty-one or who survive the life tenant is contingent, since the persons to whom the remainder is given are only those children who attain the required age or those who survive the life tenant. The contingency of their surviving or attaining the required age is expressly made precedent to their right, as the persons who are to take remain uncertain until this contingency has happened.⁶

Where a gift is made to a class of persons on the death of a precedent tenant for life, or on the happening of a future contingency, it is a generally accepted rule of construction that the persons who will be entitled to take are the persons who are members of the class on the death of the tenant for life, or on the happening of the future event on which the future interest is to take effect.⁷ In some cases the rule has been laid down that where a gift is made to A for life, remainder to his children surviving,

5. *Edwards v. Hammond*, Levinz, 132; *Boraston's Case*, 3 Rep. 19; *Clarke v. Cammann*, 160 N. Y. 315; *Matter of Brown*, 154 N. Y. 313; *Wardwell v. Hale*, 161 Mass. 396; *Nelson v. Pomeroy*, 64 Conn. 257.

6. *Festing v. Allen*, 12 M. & W. 279; *Thompson v. Ludington*, 104 Mass. 193; *Robinson v. Palmer*, 90 Me. 246; *Hall v. La France Fire Eng. Co.*, 158 N. Y. 570; *Paget v. Melcher*, 166 N. Y. 399; *Strode v. McCormick*, 158 Ill. 142. See, also, § 242, *post*.

7. *Matter of Cramer*, 170 N. Y.

271 (discussed in note 4, § 241, following); *Rudd v. Cornell*, 171 N. Y. 114; *Olney v. Hull*, 21 Pick. (Mass.) 311; *Slack v. Bird*, 23 N. J. Eq. 238; *Grimmer v. Friederich*, 164 Ill. 245; *Hill v. Rockingham Bank*, 45 N. H. 270; *Sinton v. Boyd*, 19 Oh. St. 30; *Cheatham v. Gower*, 94 Va. 383. In *Grimmer v. Freiderich*, *supra*, the remainder was to the testator's surviving children. It is, of course, quite obvious that the children surviving the testator were meant here, not the children surviving the life tenant.

the word "surviving" refers to those children of A who survive the testator, not those who survive the life tenant.⁸ These cases are against the great weight of authority, and seem to have little to support them on principle. The fair presumption is just to the contrary, the natural and obvious meaning of the term "surviving children" of A, being the children of A surviving him, not those surviving the testator. In New York this rule, laid down in the earlier cases, seems now to be done away with, it being limited in the later cases to a gift in fee to A, but in case of his death, to B in fee, the testator obviously meaning that in case A should die before his own death a gift to B should be substituted, manifestly an entirely different situation.⁹

The various situations arising out of gifts to a class, discussed in a later section, illustrate the way in which the law

8. *Moore v. Lyons*, 25 Wend. (N. Y.) 119; *Embury v. Sheldon*, 68 N. Y. 227; *Ross v. Drake*, 37 Pa. St. 382. See cases in preceding note, *contra*.

9. In *Lyons v. Ostrander*, 167 N. Y. 135, referring to this supposed rule, the court said: "In *Mullarky v. Sullivan* (136 N. Y. 227) it was held that the rule that words of survivorship in a will refer to the time of the testator's death applies only to an absolute gift to one, and in case of his death to another, and it has no application in a case where the first devisee or legatee takes a life estate. In *Fowler v. Ingersoll* (127 N. Y. 472) this court referring to the rule that words of substitution usually relate to the death of the testator, said: 'But the reason of the rule fails in the case of a life estate as in such case the presumption would be that the words of contingency referred to the event which would determine the life estate.' In *Matter of Denton* (137 N. Y. 433) the same

rule is discussed as follows: 'But this rule has only a limited operation and cannot be extended to a case where a point of time is mentioned other than the death of the testator, to which the contingency can be referred, or to a case where a life estate intervenes, or where the context of the will evinces a contrary intent.' To the same effect is *Matter of Baer*, 147 N. Y. 348."

This would seem to leave very little of the rule as laid down in the New York cases above cited. The general rule undoubtedly is that the class will be determined on the death of the life tenant, not on the death of the testator, and whether the remainder be to the surviving children of the life tenant or to the surviving children of some other person, the reasonable inference is that the children living when the remainder is to vest in possession are the members of the class intended. See § 242, *post*.

will construe remainders to be vested where the language is doubtful and capable of either construction. The rule of construction last referred to above is also discussed in the same section.¹⁰

§ 241. Vested and Contingent Remainders; Remainders to Unascertained Persons.—Where land is granted or devised to A for life remainder to his heirs, or to his children who survive him, the remainder is necessarily contingent since there are no persons in existence before the life tenant's death who answer the description of the deed or will in whom the remainders can vest. It is self evident that a remainder cannot be vested unless there is some person in existence described as remainderman in the deed or will in whom the remainder may vest.¹ Before a man's death he has no heirs. His heirs are the persons entitled under the law of descent of real property to inherit his realty on his death. If he dies leaving children surviving his children are his heirs. If he dies leaving no child surviving, but survived by grandchildren, his grandchildren are his heirs. If no children or grandchildren survive him his heir or heirs may be his father, mother, brothers and sisters, nephews and nieces, uncles and aunts, or cousins, in the order named. His children will be his heirs only in case they survive him. The persons, therefore, who may eventually become entitled to the remainder on his death under a deed or will granting or devising the remainder to his heirs may be (1) his children, or (2) his grandchildren, or (3) his father, or (4) his mother, brothers and sisters, or (5) his nephews and nieces, or (6) his uncles and aunts or their descendants. It is sufficiently clear that the present interest of his presumptive heirs, or heirs apparent, is as uncertain as their

10. See § 242, *post*.

1. *Boraston's Case*, 3 Coke. 20a;
Blanchard v. Blanchard, 1 Allen
(Mass.) 223; *Richardson v. Wheat-*

land, 7 Metc. 169; *Bennett v. Morris*,
5 Rawle (Pa.), 9; *Smith v. Collins*.
17 R. I. 432; *Wallace v. Minor*. 86
Va. 550.

chance of surviving him, as uncertain, for instance, as the inchoate right of dower.

Nevertheless the New York Court of Appeals has decided that the children of the life tenant in such case have vested remainders, the court applying the statutory definition of vested remainders in apparent disregard of the accompanying definition of contingent remainders contained in the same section.² The statute provides that a future estate "is vested when there is a person in being who would have an immediate right to the possession of the property, on the determination of all the intermediate or precedent estates." Since the children of the life tenant are persons in being who would have such immediate right to the possession on the death of the life tenant, they qualifying as his heirs at the moment the life estate ends, the court holds that they have vested remainders. But the same section goes on to provide as follows: "It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain." Nothing could be clearer than that the class of persons named as remaindermen, the heirs, remains uncertain until the life tenant's death. The section of the statute referred to can be construed only in one way, viz.,

² Moore v. Littel, 41 N. Y. 66; House v. Jackson, 50 N. Y. 161. Both cases were based on the same conveyance by which the property in question was conveyed to Jackson, remainder to his heirs, Jackson having subsequently conveyed his life estate to his children. In the Moore Case the question was whether good title was made through the foreclosure of mortgages given by two of the children on the part of the property received by them on a voluntary partition of the property among the children of Jackson, the life tenant. The court said that Jackson's children took vested remainders, but the pre-

vailing opinion makes clear that this holding was unnecessary, since the interests of the children could be mortgaged and sold under foreclosure with equal facility whether contingent or vested. In other words there was no occasion to decide whether the remainders were vested or not, the title of the defendants under the foreclosure being good in either case. In House v. Jackson the point was necessarily involved, however, and the court, following the *dictum* in the Moore Case as though it were law, held that the remainders in question were vested.

that the remainder is vested when limited to persons who are ascertained and who will be immediately entitled to take on the termination of the preceding estate or estates. It may be argued that in the cases above referred to their remainders are vested subject to be defeated and to go over to others by way of conditional limitation in case they do not survive the life tenant. But there is nothing in such a grant or devise which gives them any interest until they qualify as heirs by surviving the life tenant. The trouble is they are not named at all except as possible members of the class to be ascertained on the life tenant's death. If the deed or will can be construed in any case as a grant or devise of the remainder to the life tenant's children, or to his presumptive heirs, they take vested remainders if living when the deed or will takes effect.³ But any such construction was impossible in these cases, nor was it attempted by the court.

Later cases in the same court questioning this rule have created a serious doubt as to whether it is still law in New York.⁴ A manifest error of this sort ought to be corrected

3. *Putnan v. Story*, 132 Mass. 205; *Haverstick's Appeal*, 103 Pa. St. 394; *Alverson v. Randall*, 13 R. I. 71; *Wallace v. Minor*, 86 Va. 550.

4. *Hennessy v. Patterson*, 85 N. Y. 91 (dicta strongly challenging the rule laid down in *Moore v. Littel and House v. Jackson*); *Purdy v. Hayt*, 92 N. Y. 446, 454 (the court holding that remainders limited to the children of the life tenant surviving her were contingent, though children had been born to her who would be immediately entitled to take on their mother's, the life tenant's, death); *Hall v. La France Fire Engine Co.*, 158 N. Y. 570 (here a gift was made to a tenant for life, "and at her death to the heir or heirs of her body her

surviving." The court held that the remainder was contingent since it could not be determined who such heirs would be until her death. The court said, very correctly, that these remainders came directly within the statutory definition of a contingent remainder, the persons to take remaining uncertain); *Paget v. Melcher*, 156 N. Y. 399 (here remainders were given to the surviving children of two cotenants for life. The court held that the remainders to the children were contingent, since only those surviving would take); *Matter of Crane*, 164 N. Y. 71 (here the remainder was limited to the brothers and sisters of the testator and a niece, all of whom were ascertained.

in this as in other cases in which the highest court has corrected earlier errors made by the same court in determining laws of property.⁵

On the death of any one of them leaving issue during the continuance of the life estate, then the share of the one so dying should be paid over to their issue in equal shares. Because the direction was for a division and distribution after the death of the life tenant, the court held that the brothers and sisters and niece took contingent remainders, as the testator intended that their surviving the life tenant should be a condition precedent to the vesting of their interests).

On the other hand the Moore Case has been commented on by way of *dicta* with approval in several cases. In *Dougherty v. Thompson*, 167 N. Y. 472, the court after showing that the interest limited to Stephen J. Thompson was contingent since it depended upon his surviving another person, coming squarely within the statutory definition of contingent remainders (p. 486), proceeds on the following page to swing directly about, stating that the definition of vested remainders must be considered also, decides that the remainder in question was vested, subject to be divested by failure to survive, citing the Moore Case. The court failed to see that the statutory definition of contingent remainders, as explained in the text, can be given no other interpretation than that such a remainder is contingent, while the statutory definition of vested remainders may be fairly interpreted, as stated in the text, so as to be entirely consistent with the definition of contingent remainders, and

what is more important, so as to be entirely consistent with the fundamental nature of vested interests. This was *dicta*, the court stating that whether vested or contingent the remainders were defeated by his failure to survive.

In *Losey v. Stanley*, 147 N. Y. 560, a trust for the benefit of A, on his death to such of A's children as would survive him, was created. The remainders were called vested on authority of the Moore Case, but this was *dicta*, since the decision would have been the same had the court decided that the remainders were contingent.

In *Campbell v. Stokes*, 142 N. Y. 231, and *Byrnes v. Stilwell*, 103 N. Y. 453, there are similar *dicta*, not at all essential to the decisions, but in general approval of the Moore Case. The latter case is the usual vested remainder to children, subject to be divested in case any child should die before the life tenant, discussed in § 242. In *Matter of Cramer*, 170 N. Y. 271, the gift was to two grandchildren with the provision, as construed by the court, that if either one should die without issue the other should take if surviving. Survivorship was a condition precedent to the right of each to take the share of the other in case of death without issue.

In this state of the authorities it would seem to be clear that the court is free to adopt the true rule, correcting the error in the Moore Case.

5. For a case in which the same

Where land is devised to A for life, remainder to such of his children as survive him, the same question arises. It is clear that only such children as actually survive the life tenant are named as remaindermen. The persons who are to take remain uncertain until the life tenant's death, and before that time his children have contingent remainders.⁶ But if the remainder be given to the children of the life tenant, with the further provision that if any child die, or die without issue surviving, before the life tenant's death, the shares of those so dying shall go over to the survivors, the children take vested remainders, because they are named or identified. Their vested interests are subject to defeat in case they die during the life tenant's life, going over to the survivors by way of conditional limitation.⁷

If a remainder be limited to the child or children of a living person, and when the deed or will takes effect the person named has no children, the remainder is necessarily contingent on the birth of a child. Until then there is no one in existence in whom the remainder may vest. On the

court corrected an earlier error, though it involved a rule of real property law, see *Rumsey v. N. Y. & N. Eng. R. Co.*, 133 N. Y. 79.

6. *Blanchard v. Blanchard*, 1 Allen (Mass.) 223; *Smith v. Rice*, 130 Mass. 441; *Paget v. Melcher*, 156 N. Y. 399; *Hall v. La France Fire Eng. Co.*, 158 N. Y. 570; *Matter of Cramer*, 170 N. Y. 271 (survivorship a condition precedent); *Matter of Crane*, 164 N. Y. 71 (last four cases discussed under note 4 *supra*); *Rudd v. Cornell*, 171 N. Y. 114; *Robinson v. Palmer*, 90 Me. 246; *Madison v. Larmon*, 170 Ill. 65; *Strode v. McCormick*, 158 Ill. 142; *Smith v. Block*, 29 Oh. St. 488; *Small v. Small*, 90 Md. 550.

There is no distinction on principle between this case and the case of a remainder to the heirs of the life ten-

ant. The New York cases above cited would seem to settle the law to the effect that the rule laid down in *Moore v. Littel*, does not apply to this situation. They in effect overrule the *Moore Case* since necessarily inconsistent with it. See, however, cases cited in note 4, *supra*, as approving the *Moore Case* some of which involved a remainder to surviving children. As pointed out in the note they were *dicta*, the question whether the remainders were contingent or vested not being material.

7. *Blanchard v. Blanchard*, 1 Allen (Mass.) 223; *Campbell v. Stokes*, 142 N. Y. 231; *Byrnes v. Stilwell*, 103 N. Y. 453; *Moore v. Appleby*, 108 N. Y. 237; *Collins v. Collins*, 40 Oh. St. 353; *Kemp v. Bradford*, 61 Md. 330. See cases in preceding note.

child's birth the remainder becomes vested in the child. In all cases where the uncertainty to the remainderman's *right* is removed by the happening of the condition precedent on which his estate depends, his interest becomes vested, though the actual enjoyment may be postponed for a much longer time. A remainder to such person as may be mayor of New York City on the death of the life tenant is contingent for the same reason. Whenever the person who is to take by way of remainder is uncertain the remainder is contingent.

§ 242. Vested and Contingent Remainders — Remainders to a Class.— Where remainders after a life estate are given to a class of persons, the remainders may be contingent or vested, dependent on whether or not the persons constituting the class are, at the time the deed or will takes effect, existing persons, concerning whose membership in the class there is no dispute. If land be conveyed or devised to A for life, remainder to his children, the remainders so created are vested if at the time the deed or will takes effect A has a child or children living, vesting in the child or children then living. The presumed intention, however, is that all the children of A shall take the remainder in equal shares. Therefore if children are thereafter born to A, each child so born shares equally in the remainders with the other children, the remainder vesting in all of them equally at all times, finally vesting in possession on the death of A. As each child is born the vested remainders of the children already in existence are defeated to the extent required to admit the new-born child to an equal share.⁸ To that extent

8. *Minnig v. Batlorff*, 5 Pa. St. 503; applied in case of remainder to Ross v. Drake, 37 Pa. St. 373; *In re* nephews and nieces of the testator); Evans Est., 155 Pa. St. 646; *Corse v. Dorr v. Lovering*, 147 Mass. 530; Chapman, 153 N. Y. 466; *Haug v. Lariverre v. Rains*, 112 Mich. 276 (remainder in children created by deed. *Schumacher*, 166 N. Y. 506; *Haggerty v. Harkenberry*, 52 N. J. Eq. 354; No discussion of principle on which *Hills v. Simons*, 125 Mass. 536 (rule the interest of subsequently born

we have what is clearly a fee upon a fee, the fee in remainder in the children in existence being in part defeated, and going over to the new-born child. Though the interests of the children born after the deed or will take effect are called remainders, which become certain and therefore vested as each child is born, it is submitted that they are really executory interests which would not be valid under the ancient common law rules. If land be given to A for life, remainder to B in fee, but if B die during the life of A then to C in fee, B has a vested remainder, and C has an executory interest, a fee upon a fee, good when created by will or by deed under the Statute of Uses, but clearly void according to the common law when created by common law conveyance. No real distinction can be drawn between that case and the case under consideration. If the members of the class actually in existence when the deed or will takes effect are regarded as having vested remainders, the other members subsequently qualifying as members of the class being regarded as having future contingent executory interests, not vested remainders, until their interests become vested upon their becoming members of the class, some confusion which has arisen in applying the rule against perpetuities to these cases would disappear.⁹

children depended); *Amos v. Amos*, 117 Ind. 19; *Field v. Peoples*, 180 Ill. 376.

9. See Gray, *Perpetuities* (2d ed.), §§ 110, 110a, 205a. The rule against perpetuities undoubtedly applies to these "vested" interests, if the class may not be determined and their shares fixed within the period fixed by the rule. See Ch. XV, *post*. But the vested interests of those living at the testator's death should not be treated as violating the rule in any case. Only the interests of those not yet born could violate the rule. If

the interests of those who were alive at the testator's death are subject to be increased in size by the death of other members of the class before final vesting in possession takes place, it is only this future possible added interest, not the original vested interest, which may violate the rule.

In nearly all the cases in which this question has arisen the interests were created by will, and the implied provision in favor of subsequently born children would therefore be effective as an executory devise. In most cases they would also be good when

As explained in the preceding section, remainders to the surviving children of the life tenant are contingent, since it cannot be determined what children of the life tenant will survive him until his death. The remainder cannot vest in his children living when the deed or will takes effect because those children may die and other children subsequently born to him may be the class to whom the remainder is given. They are not named in the will, as they are not the surviving children of the life tenant until his death.¹⁰ So in any case in which the members of the class of persons who are to take can be determined only on the happening of some future event, the remainders to such class are necessarily contingent.

But where the remainder is limited to the children of the life tenant, with the further provision that in case any child should die before the life tenant or so die without issue surviving, his share should then go over in equal shares to the other children surviving him, the children of the life tenant take vested remainders subject to be divested as to each child in case he die before the life tenant. These children are the class named as remaindermen in the will. Their *right* to the remainder is not subject to any condition

created by deed, under the Statute of Uses, or under modern statutes permitting the creating of a fee upon a fee by the ordinary deed as well as by deed under the statute of uses or by will. See § 250, *post*. In *Lariverre v. Rains*, 112 Mich. 276, the only case of those cited in the preceding note in which the limitation was by deed, the point is not referred to. There seems to be a loose assumption in the cases without analysis or statement of reason, that the remainder is in some way vested throughout, though this is clearly unthinkable as to the interests of the members of the class not yet born. In *Anthracite*

Sav. Bank v. Lees, 176 Pa. St. 402, the court held, in this vague way, that the entire remainder was vested, though the future interests of the children who might be born after the creating of the remainder were, of course contingent, the point being directly involved in applying a statute permitting the Orphan's Court to authorize a sale of property in the case of contingent interests in unascertained persons, the court holding that in the case of a remainder of this kind the Orphan's Court had no jurisdiction.

10. See § 241, note 6.

precedent. They are entitled to take the property in possession and enjoyment at any moment should the life tenant die. The right of each is subject to be defeated, however, by the taking effect of an executory interest, a fee upon a fee called a conditional limitation, in favor of the others in case of death before their parent, the life tenant.¹

For the sake of clearness, it should be understood at this point that where a person grants or devises a present estate in property to a class of persons, only those persons who are members of the class at the time the deed or will takes effect are entitled to take.² But when a future estate is given to a class either by way of remainder after a precedent estate, or by way of executory interest on the happening of a subsequent contingency, the time in which membership in the class is to be determined is taken as a rule of construction to be the time of the termination of the precedent estate or the happening of the contingency on which the future executory interest depends. The fair inference is that the persons intended by the testator were those who would come within the class described when the precedent estate should end, or when the contingency should happen on which the executory estate in the class should arise.³ This is a mere rule of construction, and therefore if the will expresses the intent of the testator as limiting the class to those persons who are members of it when the will takes effect at his death, only those persons take, and in the absence of some other contingency their interests are vested.⁴ It is settled as a rule of convenience that in the case of a gift to a class, if one member of the class becomes entitled to the estate in possession and enjoyment, the class is then closed, and children born thereafter are excluded. Thus in the case of a

1. See § 241, note 7.

2. *Singleton v. Gilbert*, 1 Bro. C. C. 542n; 1 Cox 68; *Picken v. Matthews*, 10 Ch. Div. 264; *Wilkinson v. Duncan*, 30 Beavan 111, and cases cited in preceding notes under this section.

3. See cases cited in note 8, immediately preceding, this being the precise point on which the cases there cited were decided. See, also, § 240, note 7, *ante*.

4. See § 240, notes 7 and 8, *ante*.

gift to the children of A who attain the age of twenty-five and one of such children attains that age, so that he becomes entitled to his interest in possession, the class is then closed, and subsequently born children of A are excluded from the class, the children of A then in existence being entitled each to his share upon attaining the required age, provided the rule against perpetuities is not violated.⁵

§ 243. Remainders in the Alternative and Cross Remainders.—Where a gift is made to A for life, remainder to his children surviving him in fee if he die leaving issue, but if he die without issue then to B in fee, B and the children of A have contingent remainders in the alternative, only one of which can vest in the death of A. If A dies survived by children the remainder then vests in the children; if he dies without issue surviving the remainder vests in B.⁶ One remainder does not defeat the other. Only one of the two remainders in the alternative can ever vest, and on the vesting of one the others are not divested; they are defeated through the failure of the condition precedent on which they depended. They have always been valid, therefore, as remainders at common law as well as at the present time. They may take any form in which two or more remainders are made to depend on some contingency, only one of which is to become vested on the determining of the contingency, the one which actually vests depending on the way in which the contingency is determined.⁷

If *Moore v. Littel*⁸ is sound law, then in the above cases the children of A have vested remainders during A's life,

5. *Picken v. Matthews*, 10 Ch. Div. 264; *Stevenson v. Lesley*, 70 N. Y. 512; *Gray*, *Perpetuities* (2d ed.), § 379.

6. *Loddington v. Kime*, 1 Salkeld 224; *Egerton v. Massey*, 3 Com. Bench (N. S.) 338; *Hennessey v. Pat-*

terson, 85 N. Y. 91; *Roosa v. Harrington*, 171 N. Y. 341.

7. In addition to cases in preceding note, see *Buzby's Appeal*, 61 Pa. St. 111; *Micheau v. Crawford*, 8 N. J. L. 90; *Demill v. Reid*, 71 Md. 175; *Furnish v. Rogers*, 154 Ill. 569.

8. 41 N. Y. 66. See § 241, *ante*.

since they stand ready to take the remainder in possession and enjoyment immediately on A's death if it should occur at any moment. Their remainders being vested and subject to be divested by their failure to survive A, the interest of B is a conditional limitation, a fee upon a fee, which would be void at common law. The fact that the New York cases above cited in which this question has arisen have refused to hold anything of the sort, holding that these interests are all contingent remainders, goes far to establish that the rule laid down in *Moore v. Littel* is not law.

Where a gift is made to A and B for life, they holding as tenants in common of the same property, or each being given a life estate in a separate parcel of land, with the provision that on the death of one the entire property shall go to the other in fee or for life, A and B have cross remainders which are necessarily contingent on the one surviving the other. Survivorship is here a condition precedent to the right of either one to the remainder in the entire property. If A survives he takes the entire property, or both parcels, as the case may be, in remainder. If B survives the remainder vests in him. The remainders are said to cross each other, hence their name.⁹ They are really an instance of contingent remainders in the alternative, depending on exactly the same principle, the remainder in the entire property vesting in only one of them on the determination of the contingency of survivorship between them. Apart from statutory restrictions limiting the number of successive life estates there may be any number of such cross remainders between the same number of persons, remainder after the life estate of any cotenant for life or cross-remainderman passing on his death to the survivors for life, until finally vesting in severalty in the last survivor, or in any other

⁹ Co. Litt. 195, Butler's note; *Purdy v. Hayt*, 92 N. Y. 446, and *Dana v. Murray*, 122 N. Y. 604; cases in note 11 following.

person on the death of the last survivor if so expressly provided.¹⁰

An important rule of construction in this connection should be noted. Where a devise or bequest is made to two or more persons for their lives, remainder to some other person on the death of the survivor of the life tenants, the life tenants take cross-remainders for life, the ultimate survivor taking the property in severalty for his life, that being the presumed intent of the deviser in the absence of an expression in the will of a contrary intent.¹¹

By statute in New York and some other states, where a remainder in fee is limited after more than two successive life estates it vests in possession on the expiration of the first two life estates, the subsequent life estates being void in their creation. This necessarily limits cross-remainders for life to two when followed by a remainder in fee.¹² There appears to be nothing, however, to prevent the creating of any number of successive life estates where the balance of the fee is retained as a reversion in the grantor or heirs of the deviser, and in such case there is nothing to prevent the creating of any number of cross-remainders for life.¹³

10. *Dow v. Doyle*, 103 Mass. 489; *Kerr v. Verner*, 66 Pa. St. 326, Gray, *Perpetuities* (2d ed.), § 207. The rule against perpetuities is not violated since the cross remainders must all vest during lives in being, provided all the remaindermen are in existence at the creation of the remainders.

11. *Dow v. Doyle*, 103 Mass. 316; *Glover v. Stillson*, 56 Conn. 316; *Kerr v. Verner*, 66 Pa. St. 326.

12. N. Y. Real Prop. L., § 43; *Purdy v. Hayt*, 92 N. Y. 446. In this case property was devised to two sisters, Jane and Catherine, for life, with cross remainders for the life of the survivor, remainder to the testator's niece for life, remainder over. The

life estate in the niece was void as to the undivided one-half interest of the sister who died first, making the third successive life estate, but as to the other undivided one-half interest it was valid, being only the second life estate therein.

13. This follows from the language of § 43, N. Y. Real Prop. Law, providing that "Successive estates for life shall not be limited, except to persons in being at the creation thereof; and where a remainder shall be limited on more than two successive estates for life all the life estates subsequent to those of the two persons first entitled thereto shall be void, and on the death of those persons, the

§ 244. Destruction of Contingent Remainders by Failure to Vest Before Destruction or Termination of Precedent Estate.—As we have seen, a contingent remainder was void unless limited after a precedent freehold estate, either for life or in fee tail, since otherwise the seisin would be in abeyance until the happening of the condition precedent on which the remainder depended.¹ It was also necessary that every contingent remainder should become vested by the happening of the contingency on which it was created before the termination of the precedent estate, either by its natural termination through the death of the life tenant or the death of the tenant in tail without issue surviving, or by forfeiture, merger or other destruction of the precedent estate before its natural termination. The seisin of the precedent life tenant or tenant in tail was absolutely essential to the continued existence of the contingent remainder limited thereon. If on the death of the life tenant the condition precedent on which the remainder depended had not as yet happened, the remainder became void, since to give it effect would leave the seisin in abeyance until the happening of the contingency on which the remainder would become vested.² For the same reason the destruction of the life estate by forfeiture arising from the treason of the life tenant, or from an attempt by the life tenant to convey by feoffment an estate in fee, would immediately destroy any contingent remainders limited thereafter, unless they had already become vested by the happening of the condition precedent on which they depended.³ If the precedent es-

remainder shall take effect, in the same manner as if no other life estates had been created." If the remainder so limited is contingent it will not take effect until the happening of the contingency on which it depends. *Purdy v. Hayt*, 92 N. Y. 446.

1. § 238, note 4, *ante*.

2. Co. Litt. 378a; Williams Real

Prop. (17th ed.), 418; Digby Hist. Law Real Prop. (5th ed.), 268.

3. Authorities cited in preceding note, also Fearné Cont. Rem. 307, *et seq.*; 2 Bl. Com. 168; *Harris v. Howell*, 10 Barn & C. 191; *Loddington v. Kime*, 1 Salkeld, 224; *Poor's Lessee v. Considine*, 6 Wall (U. S.) 458; *Madison v. Larmon*, 170 Ill. 65;

tate was an estate tail, its natural termination by failure of issue, or its destruction by fine or recovery destroyed any contingent remainder limited after it for the same reason.⁴

Destruction of the precedent life estate by merger with the ultimate vested remainder in fee or reversion had the same effect. Such merger was accomplished by the conveyance of the life estate to such remainderman or reversioner, intermediate contingent remainders being thus destroyed. The limiting of a life estate and the reversion or vested remainder in fee to the same person by the original grantor or deviser did not cause a reversion, that being contrary to the evident intent of the donor, but a conveyance in such case by the life tenant to another, vesting his entire interest in such other, accomplished a merger which destroyed intervening contingent remainders dependent on the life estate.⁵ By statute in England and by statute and decision in most of the states the destruction of the precedent life estate by forfeiture or merger no longer affects the contingent remainder. It will take effect on the happening of the contingency as though the life estate still continued to exist.⁶ The same is generally true where the life

Waddell v. Rattew, 5 Rawle (Pa.) 231; Jordan v. McClure, 85 Pa. St. 495. These rules have no application to equitable contingent remainders. Since the seisin is always in the trustee, it is quite immaterial whether the life estate is ended or destroyed before the vesting of the contingent remainder of the *cestui que trust*. Digby (5th ed.), 373, note; Abiss v. Burney, 17 Ch. Div. 211. Destruction of precedent estate by forfeiture for breach of condition destroys contingent remainders limited thereon at common law. Fearne Cont. Rem. 383, Butler's note; Williams v. Angell, 7 R. I. 145.

4. All remainders limited after estates tail were defeated by fine or recovery by which the entail was barred and the estate converted into an estate in fee simple. Digby (5th ed.), 254. See § 86, *ante*, as to fines and recoveries barring entails.

5. Fearne Cont. Rem. 341; Bowle's Case, 11 Coke 80a; Egerton v. Masey, 3 Com. B. (N. S.) 338; Bennett v. Morris, 5 Rawle (Pa.) 9; Jordan v. McClure, 85 Pa. St. 495.

6. 8 and 9 Vict., ch. 106, § 6 (1844); §§ 1423, 1426, Stim. Am. St. Law. Statutes to this effect have been enacted in New York (Real Prop. L. § 57), Massachusetts,

estate ends naturally before the contingency on which the remainder depends has happened.⁷ The contingent remainder takes effect on the happening of the contingency on which it depends irrespective of what has happened to the precedent estate. The old rule was based on the necessity of seisin to the feudal relation, and this reason has disappeared centuries ago with the disappearance of feudalism. Even where there is no statute expressly doing away with it, or decisions declaring it obsolete, it may be confidently expected that the courts will hold that this rule of the common law no longer exists, all reason for it having long since disappeared.⁸

In the case of contingent remainders after estates tail, the statutes either doing away with estates tail, or permitting them to be changed into estates in fee simple by con-

Maine, Michigan, Wisconsin, Indiana, Minnesota, California, the Dakotas, Virginia, West Virginia, Kentucky, South Carolina, Alabama, Mississippi, Texas and probably in other states.

In *Harris v. McElroy*, 45 Pa. St. 316, the court holds that the rule that a contingent remainder is destroyed by the destruction of the precedent estate is not applicable to our institutions and should, therefore, be rejected.

That this rule is still sometimes recognized when not abolished by statute, see *Madison v. Larmon*, 170 Ill. 65.

7. N. Y. Real Prop. L. § 58, which provides that failure to vest before death of the life tenant has no effect on the contingent remainder, which will vest in possession thereafter on the happening of the event on which it depends. That this is the general rule, see statutes in the different states referred to in the

preceding note. This change in law has not as yet been made in England. See preceding note.

During the interval between the termination of the life estate and the vesting of the remainder the property belongs to the grantor or heirs of the deviser or other person entitled thereto subject to the contingent remainder. This follows from the rule, now well settled, that the fee in reversion is in the grantor or heirs of the deviser or vested remainderman in fee until the contingent remainder becomes vested, since a contingent remainderman has, in fact, no estate, only a future contingent interest. *Gray Perpetuities*, § 11, and authorities there cited; *Egerton v. Massey*, 3 Com. B. (N. S.) 338.

8. *Harris v. McElroy*, 45 Pa. St. 316, discussed in note 6 above; but see *Madison v. Larmon*, 170 Ill. 65, which recognizes the old rule, though all reason therefor has long ceased to exist.

veyance, have either destroyed such remainders, vested or contingent, or have provided for their destruction by permitting the changing of a fee tail estate into a fee simple by conveyance in fee simple to a third person.⁹

§ 245. Remainders to Posthumous Children.—Where a remainder was limited to the children of a life tenant, and he died without issue, but a posthumous child was thereafter born to him at common law the child would not be entitled to take, his remainder being contingent on his birth and not having vested before the termination of his father's precedent life estate. The seisin would be in abeyance during the interval between his father's death and his own birth.¹⁰ By statute in England,¹¹ and by statute or decision in the United States, posthumous children take, in these cases as in all others in which their right to property may be involved, exactly as though they were in existence before their father's death.¹²

§ 246. Transfer and Inheritance or Vested and Contingent Remainders.—Vested remainders, being certain and definite estates in land, may be conveyed, devised or inherited as freely as estates in possession. The appropriate method of conveyance was by deed of grant, not by livery of seisin,

9. See § 87, *ante*, as to statutes abolishing or modifying estates tail.

10. Williams R. Prop. (17th ed.), 418.

11. 10 & 11 William III, ch. 16 (1699).

12. N. Y. Real Prop. L., § 56, which further provides that "a future estate dependent on the contingency of the death of a person without heirs, or issue, or children, shall be defeated by the birth of a posthumous child of such person, capable of taking by descent." See statutes in different states, and sum-

mary thereof in Stimson Am. St. L., §§ 1413, 2844, 6005. See 2 Shars. & B. Lead. Cas. 356.

See, also, *Nicoll v. Nicoll*, 3 Johns. Cas. 18, the same result being reached independent of statute, no statute having been enacted at that time in New York, the court holding that the reason for the common law rule having disappeared, the rule itself would not be recognized in New York, a principle very applicable to many other situations discussed in this chapter. *Barker v. Pearce*, 30 Pa. St. 173.

these interests being future incorporeal estates without right of present enjoyment or possession of the land.¹ Contingent remainders pass to the heirs of the remainderman on his death intestate, or under his will as the case may be. This was the rule at common law as well as at the present time.² But they could not be conveyed *inter vivos*, the reason generally given being that no interest which is a mere possibility can be conveyed, the conveyance of such interests being against public policy as tending to promote litigation.³ But a release of the remainder to the present owner of the land was always valid, since it removed the remainder altogether, ending a possible source of litigation.⁴ Where a contingent remainder was conveyed by deed with warranty, if the grantor's interest subsequently vested through the happening of the condition on which it depended, the deed became valid and effectual by estoppel.⁵ If the conveyance was supported by a good consideration equity treated it as an executory promise to convey the remainder upon its vesting in the grantor, which would thereupon be specifically enforced.⁶

Contingent remainders, in common with other contingent future interests, may now be conveyed as freely as vested remainders by virtue of statutes enacted in England and

1. Williams R. Prop. (17th ed.), 397; 1 Preston Estates, 75; Glidden v. Blodgett, 38 N. H. 74.

2. Williams Real Prop. (17th ed.), 422, 423; Digby (5th ed.), 269; Kenyon v. See, 94 N. Y. 563; Winslow v. Goodwin, 48 Mass. 363; Chess' App. 87 Pa. St. 362.

3. Digby (5th ed.), 269; Williams Real Prop. 422, 423; 4 Kent Com. 260; Hopper v. Demarest, 21 N. J. L. 525; Striker v. Mott, 28 N. Y. 82; Hall v. Chaffee, 14 N. H. 215, and cases in notes following.

4. Williams v. Esten, 179 Ill. 267; Miller v. Emans, 19 N. Y. 384; Smith

v. Pendell, 19 Conn. 107, and preceding note.

5. Authorities in note 3, *supra*, also Stewart v. Neely, 139 Pa. St. 309; Smith v. Pendell, 19 Conn. 107; Hannon v. Christopher, 34 N. J. Eq. 459 (here equity enforced the deed as an executory contract which should be specifically performed, the deed containing no covenants of warranty).

6. Higden v. Williamson, 3 P. Wms. 132; Hannon v. Christopher, 34 N. J. Eq. 459; Mudge v. Hammill, 21 R. I. 283, and authorities cited in note 3, *supra*.

many of the states, provided there is a remainderman to make the conveyance.⁷ Where a remainder is limited to unborn children it cannot be conveyed until the birth of the children who are to take, there being no one in existence to make a conveyance. The same is true of a remainder limited to a person or persons not as yet ascertained, as a remainder to such person as may be mayor of New York City on the death of the life tenant. But where a remainder is limited to the surviving children of a life tenant, or to his heirs, the children of the life tenant are contingent remaindermen during his life, and may convey their contingent interests to others, the grantees taking, of course, subject to the contingency of the grantors surviving the life tenant.⁸ In any similar case, though the remainder is limited to a class the membership of which will not be determined until the happening of some event in the future, those who will be members of the class in case they survive until the happening of that event are just as truly contingent remaindermen, and therefore may convey or release their interests, as contingent remaindermen who are specifically named and identified.⁹

7. 8 and 9 Vict., ch. 106, § 6; N. Y. Real Prop. Law, § 59; N. J. Gen. St. (1895), 881, § 138; *Defreese v. Lake*, 109 Mich. 415; *Young v. Young*, 89 Va. 675; *Belcher v. Burnett*, 126 Mass. 230; *Hennessy v. Patterson*, 85 N. Y. 91; 2 Shars. & B. Lead. Cas., 370, and cases in following note.

8. *Moore v. Littel*, 41 N. Y. 66; *Putnam v. Story*, 132 Mass. 205; *Belcher v. Burnett*, 126 Mass. 230; *Gormon v. Simmons*, 113 Mo. 122.

9. See cases in preceding note.

Where surviving the life tenant is made a condition precedent to the remainder limited to his children, which must always be the case when

the remainder is limited to his heirs, the contingent interest of any child will, of course, be defeated by the death of the child before the life tenant, whether the child has conveyed his interest or not, and as the interest of the child has ceased to exist, it cannot pass to the child's heirs or under his will. *Hall v. La France Fire Eng. Co.*, 158 N. Y. 570 (language in the opinion in this case to the effect that the children as presumptive heirs had a mere contingent interest which could not be conveyed, etc., was *dicta*, the interests involved being defeated through failure to survive. See the *Moore* case and the *Hennessy* case, *supra*); *Pa-*

§ 247. **The Present Law of Remainders.**—The effect of the modern statutes has been to remove most of the practical differences between vested and contingent remainders. Contingent remainders no longer depend on a precedent life estate and may be limited after tenancies for years. They are no longer in any way affected by the destruction or termination of the precedent estate, and they eventually take effect in possession on the happening of the condition precedent on which they depend, though the precedent life estate has ended long before. They may be conveyed, devised and inherited as freely as vested estates. In most of the cases cited and discussed in the foregoing sections the question of whether the remainders were vested or contingent was quite immaterial, the courts having discussed at great length and with much labor, questions which had nothing to do with the decision of the question involved. In *Moore v. Littel*, for instance, the title made under the mortgages was perfectly good whether the remainders in the children of Jackson, the life tenant, were contingent or vested.¹ In *Hennessey v. Patterson*² it was quite imma-

get v. Melcher, 156 N. Y. 399; Teets v. Weise, 47 N. J. L. 154; Bates v. Gillett, 132 Ill. 287.

1. 41 N. Y. 66. Here land was conveyed to Jackson for life, remainder to his heirs, Jackson subsequently conveying his life estate to his children, and a partition among the children following. The validity and effect of mortgages made by two of these children were involved, the contention being that mortgages were void in so far as they purported to cover the future estates limited to the heirs. As the children of Jackson, his presumptive heirs, were in existence, they had remainders, either vested or contingent, which they had a perfect right to mortgage, and title

through the foreclosure of these mortgages was perfectly good, whether the remainders were vested or contingent. No matter what the remainders were held to be the result would have been the same.

2. 85 N. Y. 91. This was the ordinary case of remainders in the alternative after a life estate. A life estate was given to Mrs. Foley and her daughter; the daughter having survived her mother, on her death the property was to go to her children if she died leaving any surviving, if she died without issue then the property was to go to the testator's nephew, John Foley. There was absolutely nothing to indicate that John Foley's surviving the

terial whether the remainder limited to Foley was contingent or vested; in either case it would pass to his heirs on his death, the only question really involved being whether Foley's surviving the life tenant was a condition precedent to his estate, he having died before the life tenant. In several other cases in which the court discussed the question of whether the remainder was vested or contingent in the light of the supposed doctrine that the annexing of futurity to the gift makes remainders contingent, the one question really was whether or not survivorship of the life tenant by the remainderman was a condition precedent to his remainder.³ In all of these cases it was quite imma-

daughter was an additional condition precedent to the taking effect of his remainder, and the court correctly decided that his contingent interest passed to his heirs, he having died before the daughter, who subsequently died without issue surviving.

3. A number of cases lay stress on whether words of gift are used in creating the remainder, or whether the language used directs a distribution at some future time, futurity being annexed to and made the essence of the gift. In these cases the one simple question above referred to was alone involved, viz.: Was the surviving of the remainderman until the future time specified expressly made a condition precedent to the gift in remainder? Thus in *Matter of Crane*, 164 N. Y. 71, the will provided "Upon the decease of my said wife, I order and direct that my estate be divided as follows, viz.: Equally between my brothers and sisters and my niece, Flora W. Buckley, each to take one equal share thereof. Provided, further, that if any of my said brothers and sisters and niece

shall depart this life before my said wife, leaving lawful issue him or her surviving, then the share of the one so dying shall be paid over to their issue in equal shares." Here the court decided that the class who were to take was determined on the death of the wife, and consisted of the brothers and sisters and niece then living, and the descendants of those who had died, so that the interest of each was contingent until the death of the wife. But what difference did it make whether these interests were contingent or vested subject to be divested? Those entitled to take would be the same in either case, viz.: The surviving brothers and sisters and niece, and the descendants of those who had died. These interests in either case could be conveyed, subject to defeat in case the grantor failed to survive the life tenant.

In *Roosa v. Harrington*, 171 N. Y. 341, there was a gift for life to the testator's son, Charles, with remainders in the alternative either to Charles' issue if he died leaving children, or if he did not, then to his son

terial whether the remainders involved were contingent or vested. In either event they would pass by conveyance, devise or inheritance as the case might be and would be unaffected by the death of the remainderman, unless his surviving was expressly made a condition precedent to the remainder. In other words the one question in all these cases is this: What are the conditions on which the remainder depends, and have they happened? If they have, then the remainder takes effect on the termination of the precedent estate, whether it be called vested or contingent, either in the remainderman or his assigns if he is alive, or in his heirs, devisees or assigns if he is dead. The one material question is, have the conditions precedent to the estate of the remainderman, if any, happened or not?

The modern law of remainders is, therefore, very simple if the courts and legal writers would only accept it as it is,

and daughter, William and Sarah. There was nothing to show, as there was in the preceding case, that their surviving the life tenant was a condition, whether precedent or subsequent, to the gift in remainder, the court therefore holding that they took contingent remainders not in any way dependent on their surviving, but dependent only on the contingency of Charles' death without issue surviving him which remainders could be conveyed, inherited or devised. Here again the sole question was whether the remainder was subject to be defeated by their failure to survive the life tenant, and the question of whether the condition of survivorship, if it had been found to exist, was precedent or subsequent was quite immaterial, the result being the same in either case.

In determining the question of fact whether survivorship is made a condition of the remainder, whether pre-

cedent or subsequent, the rule of construction above referred to, that where no language of present gift is used, but a direction for distribution at some later time, survivorship until that time will be taken to be a condition of the gift, is of very little value. It runs counter to the rule of construction that in case of doubt a remainder will be construed to be vested rather than contingent. In determining whether only surviving members of the class are to take on the final division at the end of the life estate this rule of interpretation is of no value except, perhaps in case of a question of serious doubt, there being other circumstances, as in the Matter of Crane, *supra*, indicating an intent to make survivorship a condition precedent. See *Paget v. Melcher*, 156 N. Y. 399; *Rudd v. Cornell*, 171 N. Y. 114; *Corse v. Chapman*, 153 N. Y. 466.

discarding the empty verbiage of the past, and no longer encumbering their opinions or writings with the discussion of rules which have ceased to have any application whatever, since they are no longer in existence. Apart from the Rule against Perpetuities what question can arise with reference to remainders except the one question of whether or not the remainder is subject to a condition precedent or subsequent, and whether the interest of the remainderman, his heirs, devisees or assigns, has been changed into a present estate in possession or has been finally defeated, as the case may be, by the happening or failure to happen of the contingency or contingencies on which the remainder depends, if such are found to exist? If these contingencies are conditions precedent, and they have happened, the estate takes effect exactly as though vested from the beginning. Whether the remainder be vested or contingent, if it is determined in such way that the estate cannot vest in possession the remainder is defeated whether it be called vested or contingent. It is quite immaterial whether the precedent estate has come to an end some time before the vesting in possession of the remainder. The remainder passes by grant, devise or inheritance exactly in the same way, whether contingent or vested. Of course, if survivorship is a condition precedent to the remainder it is absolutely defeated by the death of the remainderman before the time fixed, since failure to survive until after such time is the failure of the condition precedent on which the remainder depended. If failure to survive is a condition subsequent, the remainder, though vested, is just as effectually defeated so that it cannot vest in possession on the termination of the precedent estate or estates. Apart from this one question there is little left of the law of remainders except the application of the Rule against Perpetuities, which will be considered in a later chapter.⁴

4. See Ch. XV and Ch. XVI, *post*.

§ 248. **The Rule in Shelley's Case.**—The law of contingent remainders as heretofore discussed is subject to one important modification. Where land is given to A for life, remainder to his heirs or to the heirs of his body, he takes an estate in fee simple or in fee tail, the courts construing the grant or devise as a limitation to A and his heirs, or to A and the heirs of his body, as the case may be. The explanation of this rule of construction, known as the rule in Shelley's case, is as follows: Originally the owner of a fee could convey only with the consent of his lord; until the Statute of Wills he could not devise it by will. It was not an easy matter to defeat the right of inheritance of his heir, which in nearly all cases would take effect on his death. It was quite natural, therefore, at this early time, before the right to convey estates in fee had become fully established by the Statute *Quia Emptores*, that a gift to A for life, remainder to his heirs, should be regarded as substantially the same thing as a gift to A and his heirs.⁵ The word "heirs" signified not only the heir of the donee, but the heir of such heir and thereafter in succession for all time. The limitation to the heirs of the donee, therefore, could not be construed as a gift to a definite person or class of persons the heir or heirs, but a gift to the entire line of decent, direct or collateral, in other words this limitation signified and expressed the duration of the estate granted to A, since it was unreasonable to suppose that the grantor intended so impossible a limitation as a series of life estates to the heirs in succession for all time. The language was, therefore, construed as words of limitation, defining the duration and character of the estate given to A, rather than words of purchase giving a definite future estate to individuals or a succession of individuals who would qualify as heir or heirs, generation after generation in the line of descent of A,

5. Williams Real Prop. (17th ed.), long before Shelley's Case. Year Book, 398, 399; Shelley's Case, 1 Rep. 94, 18 Edw. II, 577, Williams 398, note. 104. The rule had been established

direct or collateral. This is made very clear by considering a limitation to A for life, remainder to his heir. The rule has no application in this case, A taking a life estate and his heir apparent a contingent remainder, since a definite person is described as remainderman, the intention being to create in him a remainder for life or in fee as the case may be.⁶ So when it appears from the entire instrument that the word "heirs" were used as meaning children, or those persons only who would be the immediate heirs of the donee on his death, this rule of construction is overcome, the donee taking a life estate, and his children or presumptive heirs taking remainders in accordance with the rules heretofore discussed.⁷ But where the word "heirs" is used in its technical sense as indicating the line of descent forever, the rule applies no matter how clearly the instrument creating the estate may express a contrary intent.⁸ Thus a devise to the testator's daughter for life, and after her death to the heirs of her body, and for want of such issue to his grandson, "It being my will and meaning that my daughter should have only an estate for life in the said premises, and that after the decease of my wife and daughter the said premises should go to and vest in the heirs of the body of my said daughter * * * and that my daughter should

6. *Archer's Case*, 1 Rep. 63b; *Evans v. Evans*, 2 Ch. 173. The rule of primogeniture, that the eldest son alone inherits as heir, undoubtedly had much to do with the continued existence of the rule in Shelley's case, since a limitation to "heirs" could not reasonably be construed as referring to the heir as an individual, and to him alone. Cases where female heirs would inherit as coparceners, would, of course, come within the term "heirs," but it is manifest that the donor would not have them in mind in using the word "heirs."

7. *Loddington v. Kime*, 1 Salkeld,

224; *Roe dem. Thong v. Bedford*, 4 M. & S. 362; *Belshay v. Engel*, 107 Ill. 182, 188; *Millett v. Ford*, 109 Ind. 159; *Pierce v. Hubbard*, 152 Pa. St. 18.

8. *Roe dem. Thong v. Bedford*, 4 M. & S. 362; *De Vaughn v. Hutchinson*, 165 U. S. 566; *Carpenter v. Van Olinder*, 127 Ill. 42; *Silva v. Hopkinson*, 158 Ill. 386; *Trumbull v. Trumbull*, 149 Mass. 200; *Shimer v. Mann*, 99 Ind. 190; *Taney v. Fahuley*, 126 Ind. 88; *Grimes v. Shirk*, 169 Pa. St. 74; *Martling v. Martling*, 55 N. J. Eq. 771.

not have any power to defeat my intent and meaning in this respect," it was held, nevertheless, that the daughter took an estate tail, which could be converted into a fee simple and the entail in favor of the heirs of the body of the daughter defeated, it being clear that the expression "heirs of the body" was used to indicate the direct line of descent as long as it would last.⁹

The rule applies also to cases in which one or more life estates or other particular estates in remainder are created to take effect after the death of the first donee, remainder to the first donee's heirs. Thus where land is granted or devised to A for life, remainder to B for life, remainder to C for life, remainder to the heirs of A, A takes an estate in fee subject to the life estates of B and C. A has, therefore, a present life estate in possession, and a vested remainder in fee after the life estates of B and C, which he may convey as he pleases, defeating the chance of inheritance of his heirs.¹⁰

§ 249. The Rule in Shelley's Case in the United States.—

In many of the states this rule has been abolished altogether by statute, the donee taking a life estate and his heirs taking the remainder as purchasers in accordance with the language of the deed or will.¹ In several states the rule has been abolished in the case of wills but retained in the case of deeds.² In many states it is still retained as part of the

9. *Roe, dem. Thong v. Bedford*, 4 M. & S. 362.

10. *Williams Real Prop.* (17th ed.), 400, 401; *Digby* (5th ed.), 269.

1. N. Y. *Real Prop. L.*, § 54; *Mass. Pub. St. Ch.* 126, § 4; 2 *Howell's Annot. Stat.* (Michigan), § 5544; *Va. Code*, § 2423; *Cal. Civ. Code*, § 779; *Conn. Gen. St.* (1888), § 2953. See, also, statutes of Minnesota, Wisconsin, West Virginia, Mississippi, the

Dakotas, to the same effect. See, also, 1 *Stim. Am. St. Law*, § 1406.

2. See statutes of New Jersey, New Hampshire, Kansas and Oregon; 1 *Stim. Am. St. Law*, § 1406.

In *Lippencott v. Davis*, 59 N. J. Law 241, the court, construing the New Jersey statute, held that the statute does not apply, and therefore the rule continues, where the devisee dies without issue leaving only col-

law, and in some instances it has been defended as still accomplishing useful results, but the general tenor of decisions in those states still retaining the rule is hostile to it, since it defeats the actual intent of the grantor or devisor in most cases.³ In those states in which the use of the word "heirs" is no longer necessary to create a fee, the entire estate of the donor passing in the absence of an expressed intent to pass a lesser estate, it is difficult to see how the rule can be longer recognized, though there be no statute abolishing it.⁴ This change in the law sweeps away every reason that ever existed for it. In these states a grant or devise to A for life, remainder to his heirs cannot possibly be construed except as a remainder in fee to those persons who will be A's heirs on his death. If language be construed in its usual sense it is impossible reasonably to say that the heirs of A get nothing. It is true, as stated in a Pennsylvania case⁵ that the donor cannot create a life estate and make it at the same time an estate of inheritance which will pass to his heirs and to the heirs of such heirs by inheritance, but there is no reason why a remainder may not be limited to a definite class in fee to take effect on the death of the life tenant, and there is no reason why the clearly expressed intent to make such a limitation to the heirs of the life tenant should not be given effect. A rule of construction which defeats the expressed intent of the donor is an anomaly which should no longer be tolerated.

lateral relations. If he dies leaving issue surviving he is held to have only a life estate, remainder to such issue.

3. *Connor v. Gardner*, 230 Ill. 258; *Garver v. Clouser*, 218 Pa. St. 611; *Thomas v. Higgins*, 47 Md. 439, 450; *Brooks v. Evetts*, 33 Tex. 732. See, also, cases in note 8, under § 248. See defense of the rule in *Hillman v.*

Bonslaugh, 13 Pa. St. 344. See criticisms of the rule in *Siceloff v. Redman's Adms.*, 26 Ind. 251, 259; *Belshay v. Engel*, 107 Ill. 182, 186.

4. See § 83, *ante.* as to change in the law requiring the word "heirs" in deeds.

5. *Hillman v. Bonslaugh*, 13 Pa. St. 344.

§ 250. Future Executory Estates; Executory Devises.—

We have seen that future estates at common law could originally be created only by way of remainder. The different kinds of attempted future interests which were void under the common law were, (a) estates to arise at a future day created without any precedent particular estate; (b) a future estate to take effect some time after the termination of a precedent particular estate, as an estate to A for life, and one day or one year after his death to B in fee; (c) a contingent remainder limited on a precedent estate for years; (d) a fee limited upon a fee on a contingency destroying the first fee and causing the second to immediately take effect; (e) a future estate limited after a life estate to take effect only on a contingency destroying the precedent estate before its natural termination, as an estate to A for life, but if A should marry B the property to go over to C in fee. In the first three cases the attempted limitation was void because in each case it would put seisin in abeyance as heretofore explained; in the last two cases the courts decided that having created an estate in fee or for life, a provision that on the happening of a contingency the estate should be defeated and the property go over to another was void as repugnant to the estate first created, the attempt being to create a future interest which was not a remainder, but a future executory interest involving the destruction of the precedent estate before its natural termination.¹

After the enactment of the Statute of Wills each and every one of these future interests could be created as valid legal estates by will, and after the Statute of Uses they could be created, with one possible exception, as springing or shifting uses under that statute. When created by will they are called executory devises; when created by deed under the Statute of Uses they are called springing or shifting uses, which will be discussed in the following section.

1. See § 238, *ante*, and authorities cited.

How did it happen that the courts which refused to recognize any of these future executory interests as valid when attempted to be created by common law deed, gave full effect to them as valid legal interests when created by will? The reason was that at the time of the enactment of the Statute of Wills feudalism as a system had greatly declined, and the tendency of the people and of the courts was to escape from the restraints which the narrow technical rules of feudalism had imposed upon the disposition of property. Before the statute, wills of real property were void, having been regarded as inconsistent with the feudal relation. Therefore, after wills of realty were expressly provided for by the Statute of Wills, the courts were free to establish such rules for the interpretation and enforcement of wills as the best interests of society then seemed to demand. They were not hampered by precedents, since theretofore wills of real property had not been allowed at all, precedents arising out of the interpretation and enforcement of conveyances having no necessary application to this new situation. They decided, therefore, that the technical rules growing out of seisin in its relation to feudalism should not apply to estates created by will; that the intent of the testator should be given effect and carried out in each case, as expressed in the will, though the interest created would be in violation of any one of the common law rules as heretofore explained, had the interest in question been created by deed. Therefore in each of the cases above enumerated the future executory interest is valid and will be enforced in accordance with the expressed intent of the testator when created by will.²

2. 2 Bl. Com. 172-175; Williams Real Prop. (17th ed.), 456, 457; Waddell v. Rattew, 5 Rawle (37 Pa. Sup. Ct.), 231; Harris v. Howell, 10 B. & C. 191; Hopkins v. Hopkins, Cas. Temp. Talbot 44 (equity 1734).

Livery of seisin not being required to transfer or create a freehold interest by will, there was nothing to prevent the creating of a future executory interest by will, since the seisin would remain in the heirs of the de-

Before the enactment of the Statute of Uses, uses, which were then purely equitable estates, could be freely created as future executory interests in any of the cases above referred to in which similar limitations by deed at law would be void, and they could also be freely devised, the trustee being compelled to hold for the devisee of the use after the death of the *cestui que* use. Furthermore legal estates could be conveyed to a trustee subject to such uses as might be subsequently provided for in the will of the donor on his death, and since the legal seisin would be at all times in the trustee, these future executory interests could be created and take effect as uses after the donor's death as so provided in his will. The changing of uses into legal estates by the Statute of Uses made wills of uses void, and was the immediate cause of the enactment of the Statute of Wills shortly afterwards. It would have been highly technical and unreasonable for the courts to apply to wills of realty the technical rules which applied to deeds, as that would have made void and ineffective all the progress which had been accomplished by means of uses. The broad purpose of both statutes was to permit the creating of all interests as legal estates which could be created only as uses before these statutes were enacted. Therefore the courts were bound to hold, as they did, that these future executory interests could be created by will, after the statute, as legal estates, just as they could be created as uses by deed or will before the statute.³

visor until the taking effect of the future interest in the devisee. This, however, does not explain a fee upon a fee created by will. The true reason, therefore, is the more liberal attitude of the courts in construing wills, they being unhampered by precedents as explained in the text.

3. Williams Real Prop. (17th ed.), 456, 457; Digby Hist. L. Real Prop. (5th ed.), 381, 382. See Ch. VIII, *ante*,

as to conveyances to uses to be provided for in donor's will. These considerations explain the forces acting on the courts which brought about the more liberal interpretation of wills. They were free to adopt the rule that the testator's expressed intent should be given effect, the precedents arising from the construction of deeds not applying.

The term "executory devise" is applied only to those future executory interests created by will which would be void if created by deed under the common law. If the estate created by will is a remainder so that it would have been valid as such if created by deed, it is not an executory devise, but a remainder, subject to all the rules of law applying to remainders. If the will creates a valid contingent remainder supported by a precedent life estate, it must stand or fall as a remainder. If, thereafter, the life tenant should die before the happening of the contingency on which the remainder depends, the remainder is defeated, exactly as though it had been created by deed. It will not then become an executory devise to prevent its destruction. Thus if land be devised to A for life, remainder to B upon his marriage, B takes a contingent remainder, A taking a life estate on the testator's death, and if A should die before B's marriage, B's contingent remainder would be defeated since it would have failed to vest before the ending of the precedent life estate. On the other hand if A had died before the testator, so that at the time the will took effect on the testator's death there was no life estate to support the future contingent interest in B, B's interest would take effect on his subsequent marriage as an executory devise, it being in such case a future contingent interest without a precedent estate to support it which would be void if created by deed at common law, but which for that very reason is good as an executory devise.⁴

4. *Doe d. Harris v. Howell*, 10 Barn. & Cres. 191; *Hopkins v. Hopkins*, Cas. Temp. Talbot 44; *Waddell v. Rattew*, 5 Rawle (Pa.), 231; *Morton v. Funk*, 6 Pa. St. 483; *Blanchard v. Blanchard*, 1 Allen (Mass.) 223; *Wolfe v. Van Nostrand*, 2 N. Y. 436; *Demill v. Reid*, 71 Md. 175; *Burleigh v. Clough*, 52 N. H. 267 (vested remainder subject to be defeated by a

power to convey or devise in the life tenant will not be given effect as an executory devise in order to defeat the power).

Contingent remainders to a class of persons to be ascertained in the future are not executory devises when created by will, but must stand or fall as contingent remainders. *Gray Perpetuities*, § 60; see, also, § 242, *ante*.

But an executory devise may be changed by subsequent events into a contingent remainder. Thus if land be devised to A for life, remainder to B in fee, but if B should die during the life of A, then to C in fee upon his marriage, the limitation to C would be valid as an executory devise, it being a fee upon a fee. If B should die during A's life the interest of C would then become a contingent remainder, supported by the life estate of A, subject to the rules governing contingent remainders, and therefore liable to be defeated by a fine or a common recovery under the old law, or by the destruction or termination of the precedent life estate before the happening of the contingency on which the remainder depended.⁵

Where a devise is made to A and his heirs, but if A die without issue, then to B and his heirs, at common law A took an estate tail with a vested remainder in B, the language being construed as equivalent to a gift to A and his issue, or heirs of his body, remainder to B in fee.⁶ Under statutes changing estates tail into estates in fee simple the limitation over to B is void as violating the rule against perpetuities, it depending on an indefinite failure of issue of A, which may not happen for many generations, should the direct line of succession of A's issue continue unbroken for a long time, it being possible that B's interest will not vest for many generations.⁷ But if it appear, either expressly or by the context of the will, that definite failure of issue on the

5. *Doe d. Harris v. Howell*, 10 Barn. & Cres. 191.

Where two executory devises to take effect in succession are created, and one of them vests in possession as a life estate, the other then becomes a remainder automatically, since it is supported by the life estate. For instance, a devise to A in fee, but if A die without issue to B for life, and on his death to C in fee. On A's death without issue the first

fee which makes the interests of B & C executory devises disappears, B taking a life estate and C a remainder in fee. *Gray Perpetuities*, § 114, note.

6. *Holden v. Wells*, 18 R. I. 802; *Miller's Est.*, 145 Pa. St. 561; *Parker v. Parker*, 5 Met. (Mass.) 134, 139; 3 *Jarman Wills* (5th ed.), 94-98, and cases cited.

7. See Ch. XV, *post*, and note following.

death of A is intended, then the limitation to B is a valid fee upon a fee created as an executory devise.⁸ By statute in England, New York and several other states the common law rule of construction is changed, it being provided that such limitation shall be construed as meaning definite failure of issue on the death of the first taker, the limitation over being valid, therefore, as an executory devise necessarily vesting within one life.⁹

§ 251. Executory Estates; Springing and Shifting Uses.

—We have seen how equitable estates, called uses, developed as part of the growth of equity jurisdiction, the trustee to uses holding the legal title to the use of the beneficiary, or successive beneficiaries, as provided by the terms of the use.¹ The technical rules of feudalism arising out of suspension of seisin, as discussed in preceding sections,² had no application to uses, since the trustee was seised throughout. Therefore where land was conveyed to B as trustee to the use of C on his marriage, or on the death of the grantor, or the like, the legal title having been conveyed to B in fee, seisin was never in abeyance, since B would always be seised, as holder of the legal title, the only person recognized as owner of the property at law. Equity, however, would compel B to execute his trust, requiring him to hold the property, first for the benefit of the grantor, and then, on the happening of the event specified, for the benefit of C. In the same way a conveyance to A and his heirs, to the use of B and his heirs, but if B should die without issue

8. Dorr v. Johnson, 170 Mass. 540; Lawler v. Holohan, 70 Conn. 87; Miller's Est., 145 Pa. St. 561; Moore v. Gary, 149 Ind. 51; Summers v. Smith, 127 Ill. 645. The courts will quickly grasp at any circumstance indicating a definite failure of issue in order to support the devise.

In Moore v. Gary, and Lawler v. Holohan, *supra*, it was held that the

devise over in case the first taker dies without issue means a substitution of another in case the first taker so dies during the life of the testator.

9. N. Y. Real Prop. L., § 48; 1 Vict. ch. 26, § 295; 1 Stim. Am. St. L., § 1415; Condict v. King, 13 N. J. Eq. 375.

1. See §§ 192, 193, *ante*.

2. See § 250 and § 238, *ante*.

surviving, then to the use of C and his heirs, was valid and enforceable in equity, there being a fee in A, the trustee, satisfying every requirement at law, and in equity the trustee being bound in conscience and good faith to hold first for the benefit of B, and then on the happening of the contingency bringing the first fee to an end, for the benefit of C. Thus future equitable estates by way of use could be created in each of the five cases enumerated in the preceding section where the same interest would be void if created as a legal estate before the enactment of the Statute of Uses and the Statute of Wills.³ It has already been pointed out in a preceding chapter that one of the reasons giving rise to uses was the desire to make gifts of this sort, which were impossible at law.⁴

The Statute of Uses⁵ changed all existing uses and all those subsequently created (with certain exceptions heretofore noted) into legal estates of the same nature and duration as the equitable estate before the change.⁶ The result was that all one had to do to create a future interest at law to spring up at a future day without a precedent estate, or a fee upon a fee, or a fee on a contingency in derogation of a precedent life estate, was to convey to a trustee to the use of another on the happening of a future event, or to the use of A in fee, and upon his death without issue surviving to the use of B in fee. The use in favor of the beneficiary in each instance was changed by the statute instantly on its creation into a legal estate or interest to spring up, or to shift over, as the case might be, on the happening of the contingency in question. Where the future interest is to spring up on the happening of some future event without an intervening precedent estate to arise at the same time, it is called a springing use; if it is a fee upon a fee, the estate shifting

3. See § 196, notes 6-13, *ante*, and authorities there cited.

4. See § 192, *ante*.

5. 27 Henry VIII, 10 (1535).

6. See § 195, *ante*. The uses not affected by the statute which survived as trusts are discussed in § 197, *ante*.

over from one person to another on the happening of the event, it is called a shifting use.⁷ The term "use" is employed as designating those legal estates created in this way by operation of the Statute of Uses upon inactive equitable estates. The term "trust" is now applied to those uses which survived the statute and continue to this day as equitable estates.⁸

The usual practice after the statute was to create a use by a bargain and sale or covenant to stand seised, the grantor as covenantor or bargainer becoming for the moment trustee to uses for the benefit of the beneficiary or beneficiaries named, his legal estate being defeated by the operation of the statute which instantly put the legal estate into the person named as beneficiary of the use. Thus, if A made a deed of bargain and sale and delivered it to B, for a moment A became trustee to uses for B, the statute operating at once to transfer the legal title to B. If B's interest was to arise on A's death, A remained the owner until his death, when the property would go over to B, his heirs, devisees or assigns. In the same way a fee upon a fee could be created by way of shifting use by a deed of bargain and sale. This method was preferred to conveyances to a third party as trustee, as it was much simpler, eliminating a third party to the transaction, and became the recognized mode of conveyance under the Statute of Uses.⁹

If no valuable consideration was recited in the deed of bargain and sale, and no consideration was actually paid, the deed would be given effect as a covenant to stand seised, provided a relationship of blood existed between the parties; if there was no such relationship, and no valuable consideration was either recited or paid (the mere recital without actual payment was enough to make it valid as a bargain and sale) the deed was void. In any case of a common law

7. See § 196, *ante*, and authorities cited.

8. See § 197, *ante*.

9. Digby Hist. Law Real Prop. (5th ed.), 354-360; *Rogers v. Eagle Fire Co.*, 9 Wend. (N. Y.) 611.

deed, in which an attempt was made to create one of the future estates void at common law as enumerated in the preceding section, the deed was given effect as a deed of bargain and sale if any consideration was recited therein, whether actually paid or not, or where a consideration was actually paid, though not recited in the deed. Anything of value, though nominal, was a sufficient consideration for this purpose. If there was no such valuable consideration, but a blood relationship existed between the parties, such common law deed was given effect as a covenant to stand seised, and the future interest created therein was valid. The courts regarded such a deed, though void as a common law conveyance, as being at least a covenant on the part of the grantor to stand seised of or to hold the property for the grantee, which creates a use in equity if supported by a sufficient consideration, either of value or of blood, such use being operated on by the statute and converted into a legal estate.¹⁰

The one possible exception, clearly contrary to the fundamental principles involved, arises in the case of a contingent remainder after a term of years created by bargain and sale, or other deed under the Statute of Uses. If the language used is language of remainder it has been held that it must stand or fall as a legal remainder, subject to the rules of the common law governing contingent remainders, and if limited after a term of years it will be void, exactly as it would if created by deed at common law.¹¹ It is very clear that such a limitation differs in no respect, in so far

10. *Wyman v. Brown*, 50 Me. 139; *Shackelton v. Sebree*, 86 Ill. 616 (dicta, the court holding that executory estates may be created by deed as well as by will). See preceding note; also *Gray Perpetuities* (2d ed.), pp. 55, 56, and cases there cited.

11. *Digby Hist. etc.* (5th ed.), 361, 362; *Gray Perpetuities* (2d ed.), §§ 58-60, the conclusion being reached

that the cases holding that a contingent remainder by way of use limited after a term of years have been in effect overruled by the later cases which settle beyond doubt that such a limitation contained in a will is good as an executory devise, the principle involved being the same in both cases.

as this question is concerned, from other limitations which would be void at common law, but are rendered valid when created by deed under the Statute of Uses, such as a future executory interest created by way of springing use, or a fee upon a fee created as a shifting use.

Remainders, contingent and vested, could be created by deed under the Statute of Uses, as well as present estates in possession, and when so created they were subject to the same rules as though created by common law deed. Deeds of bargain and sale became the usual and accepted means of conveying land, together with the deed of lease and release, feoffments with livery of seisin becoming obsolete at an early day.¹²

From what has been said it is quite apparent that the law of conveyancing was revolutionized by the Statute of Uses and the Statute of Wills. Not only could future executory interests of all kinds be created by will, but they could also be created by deed under the Statute of Uses. Furthermore in every case of a common law deed in which a valuable consideration was recited, or was paid in connection with the transaction, or a relationship of blood existed, the deed was given effect as a covenant to stand seised or a deed of bargain and sale. The only deeds, therefore, in which such executory interests would be void, were those made and delivered to one who was not a blood relative by way of gift without any consideration actually paid, and without a recital of a consideration, a situation of comparatively rare occurrence. Therefore in the great majority of cases of deeds made in the old common law form, they will be given effect as deeds under the Statute of Uses where that is necessary in order to give effect to a future executory interest provided for by the terms of the

12. See § 314, *post*. Contingent created by common law deeds, and and vested remainders created by were subject to exactly the same deed under the Statute of Uses dif- rules, like remainders created by will. ferred in no respect from remainders

deed. Since the reign of Henry VIII executory interests have been valid at law as well as in equity whether created by will or by deed in any form, except in the rare cases of common law deeds without consideration either recited or paid, or without a blood relationship between the grantor and grantee.

The nature of future executory interests, as distinguished from remainders, is discussed in the section following.

§ 252. The Modern Law of Future Executory Estates.—

It is now provided by statute in New York, Indiana, Michigan, Wisconsin, Iowa, California, and a majority of the other states, that each and every one of the executory interests discussed in the last two sections may be created by the ordinary deed, as well as by will or by deed of bargain and sale or other deed under the Statute of Uses. In other words the distinctions between remainders on the one side, and executory devises and springing and shifting uses on the other, have been swept away, the technical common law rules forbidding the creating of an estate which would put seisin in abeyance, and forbidding the creating of a fee upon a fee, or a future estate in derogation or a precedent life estate being at last expressly abolished by statute.¹

In several states the courts have arrived at the same result without the aid of any statute, the reason for the technical rules of the common law having ceased to exist hundreds of years ago with the disappearance of feudalism.²

1. N. Y. Real Prop. L. §§ 50, 53; Stim. Am. St. L., §§ 1421, 1426. See statutes to this effect in Indiana, Michigan, Wisconsin, Iowa, Minnesota, Nebraska, N. Dakota, S. Dakota, California, Virginia, W. Virginia, Kentucky, Mississippi, Texas and Alabama.

2. Wyman v. Brown, 50 Me. 139; Abbott v. Holway, 72 Me. 298; Gorham v. Daniels, 23 Vt. 600; Shackleton v. Sebree, 86 Ill. 616; Sabledowsky v. Arbuckle, 50 Minn. 475; Borland v. Marshall, 2 Oh. St. 308. In these cases it is held that as conveyance by livery of seisin has been abolished or has become obsolete, the technical rules growing out of sus-

That the courts have persisted during the centuries that have elapsed since the enactment of the Statute of Uses and the Statute of Wills in continuing in life these rules, which soon became obsolete after these statutes were enacted, since they would apply, as we have seen, only in cases rarely occurring, and which were fetters upon the disposition of property from which the people were trying to escape, is as severe an indictment of the reasonableness and good sense of the courts as can be found anywhere in the law. The principle of *stare decisis* does not make the common law an unchanging immutable system, irrespective of the needs of a changing and developing society from which no relief can be had except by way of statute, though in the case of future estates the courts have made it that and worse. Nothing is better settled than the principle that the common law has within itself the continuing power of readjustment to new conditions, and that when a rule of law becomes obsolete, the reasons for it having ceased to exist, the rule itself must be declared at an end (particularly when the rule in question is hostile to the new conditions which have arisen) and that the broad principles of the common law will be extended to cover new situations and needs as they arise in a way that is consistent with established social progress. Yet in the case of future estates these technical rules which, as we have seen, never had any reason for their existence other than the narrow and peculiar requirements of the feudal relation, have been continued in existence hundreds of years after feudalism had forever disappeared as part of the social system, and after all possible reason for their existence had long since ceased. It may, therefore, be asserted with confidence that in those states in which these rules have not as yet been

pension of seisin have no longer any application, and estates to arise in the future without any precedent estate to support them may be freely created by the statutory deed generally provided for in the different states.

expressly abolished by statute the courts either have declared these rules as no longer in existence because of changed conditions, or will so declare when the question is raised in the future.³

The net result, therefore, is that no real distinction now exists, or should be recognized as existing, between remainders and executory future estates. Whether the future estate be a remainder or a future executory interest, it is valid and will vest in possession at the time and in the manner provided for by the grantor or deviser, provided it does not violate the rule against perpetuities and involves no condition precedent which is illegal or impossible. The one question which arises, is the question discussed in a preceding section with reference to the present law of remainders, viz.: Have all conditions precedent on which the future estate depends happened, or if the conditions are subsequent, has the future estate been defeated by the happening of a condition subsequent, on which the future interest was to go over to another or to revert back to the grantor or heirs of the deviser? What was said with reference to the present law of remainders⁴ applies with equal

3. See last two preceding notes. The only cases to which these rules would apply in any event after the enactment of the Statute of Uses and the Statute of Wills, were the rare cases of deeds by way of gift containing no recital of even a nominal consideration to a person as grantee who was not a blood relative. To have developed and kept alive the mass of technical law involving distinctions between future estates created by way of executory devise and springing and shifting use, on the one hand, and remainders on the other hand, in order to preserve these technical rules in this rarely occurring class of cases, the reason for these rules having ceased to exist

even in these cases, seems to have been very inexpedient as well as unreasonable. The maintaining of the distinction between remainders and executory interests had this important basis, that executory interests could not be destroyed by destruction of precedent interests or by fine or recovery, as contingent remainders could. But, as we have seen, these distinctions have been done away with, contingent remainders being no longer subject to defeat in any way except by failure of the contingency on which they depend, and fines and recoveries having been abolished. See § 246, *ante*.

4. See § 247, *ante*.

force to future executory interests which are not technically remainders. They are future estates of the same nature, and under the statutes referred to in a preceding section as making future contingent interests in land inheritable, devisable and alienable as estates in possession⁵ future executory interests may be inherited, devised and conveyed whether they are contingent or vested.

The adherence of the courts to the technical rules limiting the creating of future estates led to this peculiar result, viz.: that executory estates created by way of executory devise or springing or shifting use were regarded as mere executory interests, not estates, and were therefore never vested. For instance, a conveyance by way of springing use made by A to B in fee to take effect on the death of A, or on the death of X, or ten years from the date of the grant, or on any other event sure to happen, did not create a vested interest in B, though it depended on no contingency, the entire fee being regarded as continuing in A until his death or the death of X, as the case might be, and then springing up in B by operation of the Statute of Uses.⁶ The owner of such executory future interest could not be seised, therefore, so as to give rise to the right of dower or curtesy,⁷ and he could not sue the grantor or prior holder for waste at law, his remedy being in equity by action for an injunction.⁸ It is submitted, however, that under the modern law as established by the statutes and decisions above referred to, this distinction between remainders and executory estate is no longer tenable. They may be and are vested or contingent exactly as are remainders, and dependent on exactly the same principles. They are usually contingent, since they usually depend on a condition pre-

5. See § 246, *ante*, note 7.

6. Fearn's Cont. Rem. 1, Butler's note; Gray Perpetuities (2d ed.), § 114; Hopkins v. Hopkins, Cas. temp.

Talb., 44; Morton v. Funk, 6 Pa. St. 483.

7. 2 Scribner Dower, 702-704.

8. Co. Litt., 218b; Turner v. Wright, 2 De G. F. & J., 234.

cedent, but they may be vested where the event on which the future interest is to take effect is sure to happen, as in the cases given above. Where land is conveyed to B to take effect on the death of A, the grantor, it is highly technical and unreasonable to say that the entire fee is in A, B having only an executory *interest*, not amounting to an estate. He is the present owner of the balance of the fee over and above an estate continuing in A for his life only, of exactly the same nature in all respects as if A had first conveyed the fee to X who thereupon had reconveyed the property to A for life, remainder to B.⁹ It is high time that empty technicalities of this kind be recognized for what they really are, and that a mere difference in name without any difference in substance no longer be permitted to confuse and mislead lawyers and judges in the application of the law on this subject.

The New York statutory scheme, followed substantially in many states, does away with all distinction, even in name, between remainders and executory estates, all being classed as remainders as distinguished from reversions, and made subject to the same rules of law.¹⁰ In substance the same result has been accomplished in the other jurisdictions above referred to, it being quite immaterial whether the

9. Wyman v. Brown, 50 Me. 139; Achorn v. Jackson, 86 Me. 215; Brewer v. Hardy, 22 Pick. (Mass.) 376; Steel v. Steel, 4 Allen (Mass.) 417; Graves v. Atwood, 52 Conn. 512; Bissell v. Grant, 35 Conn. 288; Hurst v. Hurst, 7 W. Va. 289. In most of these cases, particularly in the three last cited, the court treats such a limitation as a life estate reserved in the grantor, remainder over. Technically the future interest is an executory estate, since the grantor cannot convey a life estate to himself under the common law rule requiring livery of seisin. Under

the modern law, however, there is no reason whatever why he cannot reserve in himself a life estate or term of years, granting the balance of the fee over to another as a vested future estate. Whether it be called a remainder or an executory interest is a mere matter of name, the interest being the same. It is the balance of the fee in any event, belonging to the grantee as a future estate, exactly like, in all respects, a vested remainder.

10. N. Y. Real Prop. L., §§ 35-40, 59; 1 Stim. Am. St. L., §§ 1420-1427. See § 238, *ante*, note 12.

future estate is dependent on a precedent estate or not, except in determining whether or not the estate has finally vested in possession, it vesting in possession, if a remainder, on the termination of the precedent estate and if a contingent remainder, on the further happening of the contingency on which the remainder depended; if an executory interest, on the happening of the event on which the executory estate was to take effect.¹¹

11. See §§ 244, 246, 247, *ante*.

A strange survival of the technicalities growing out of the distinctions between executory estates and remainders is the rule that where property is granted or devised to A in fee, with the provision that so much thereof as may be undisposed of by him on his death shall then go to B in fee, the limitation to B is void, being inconsistent with the power of alienation given to A, and therefore repugnant to A's estate. The technical reason for this was that a fee upon a fee was good only as an executory estate, which could not be defeated, as a contingent remainder could, by a fine or recovery, or the destruction or termination of the precedent life estate, that is, it could not be defeated by any act of the holder of the first estate; but as the holder of the first fee in the above case was given power to defeat the future estate by an alienation or other disposition of the property, the future estate cannot be an executory estate by executory devise or shifting use, and is therefore void. *Van Horne v. Campbell*, 100 N. Y. 287; *Kelley v. Meins*, 135 Mass. 231; *Foster v. Smith*, 156 Mass. 379; *Hoxsey v. Hoxsey*, 37 N. J. Eq. 21; *Mulvane v. Rude*, 146 Ind. 476; *Karker's App.*, 60 Pa. St.

141; *Lambe v. Dayton*, 182 Ill. 110. In case the first fee is a determinable fee, the Illinois court held that this limitation over was valid, a distinction without a difference.

Since there is no longer a valid distinction between contingent remainders and contingent executory interests, neither being subject to defeat by act of the prior owner, there is no longer ever an excuse for this absurd rule. There was never any reason for it, it being a good example of the sophistry which has made the law of future estate complicated and obscure. There is no reason, either in the nature of the estates involved or based on public policy, why the owner in fee may not provide that the estate of the first donee in fee should come to an end on his death in case he had not theretofore disposed of the property, and should then go over to another in fee. It is simply terminating the first fee on a given contingency, and causing the second fee to then arise, exactly as in any case of a conditional limitation on any other contingency which involves nothing illegal or impossible. Every such limitation over is necessarily in derogation of the first estate, and repugnant to it, yet that has never been an objection to such estates since the enactment of the

The general effect of the modern cases is to treat executory interests and remainders in exactly the same way, the changes effected in the law either by statute or otherwise removing all material distinction or difference. Thus where property is devised to a person for life, remainder to his children, but in case any child should die before the life tenant his share to go to the surviving children, or like limitations over by way of conditional limitation, the executory interest is treated in all respects as a remainder would be, and subject to the same rules.¹² In determining whether an executory interest is contingent or vested the same rules of construction are applied to future executory interests as apply to remainders.¹³ Gifts to a class as executory interest limited after a fee are subject to the same rules governing similar gifts by way of remainder limited after a precedent life estate.¹⁴ Future executory interests in the alternative are treated in the same way as contingent remainders in the alternative, and the same is true as to cross executory interests, with one important qualification. We have seen that where land is given to A, B and C for life, and on the death of the survivor to X in fee,

Statute of Uses and the Statute of Wills. This rule is a going back to the legal dark ages before the enactment of those statutes and the adopting in part of a rule which, as we have seen (§ 238 *ante*), never had any valid reason even under feudalism.

It is settled that where an estate is given to A for life, with full power of disposition in fee, remainder as to so much of the property as remains on A's death, to B in fee, the vested remainder in B subject to the power is valid, yet exactly the same result is accomplished. *Kelley v. Meins*, 135 Mass. 231; *Hall v. Otis*, 71 Me. 326; *Mulvane v. Rude*, 146 Ind. 476.

In New York, the rule of the cases first above cited has been changed by § 57, N. Y. Real Prop. Law, providing that an expectant estate may be defeated in any way provided by the person creating the estate, and that it shall not for that reason be adjudged void in its creation. See *Leggett v. Firth*, 132 N. Y. 7.

12. *Van Brunt v. Van Brunt*, 111 N. Y. 178; *Patton v. Ludington*, 103 Wis. 627. See cases, § 241, note 7, *ante*; 2 *Jarman Wills*, 1010, 1011.

13. See §§ 240, 241, 242, *ante*, and cases cited thereunder.

14. See § 242, *ante*, and cases cited.

cross remainders for life will be implied between A, B and C until the death of the survivor.¹⁵ But where a gift is made to A, B and C in fee, and on the death of the survivor without issue or on any other contingency, then to X in fee, there are obviously no cross executory limitations which may be implied between A, B and C. On the death of the first two the interest of each passes to his heirs, subject to be defeated by the happening of the contingency which will defeat the estate of all three and cause it to go over to X.¹⁶ Executory interests, like remainders, will be accelerated by the earlier termination or failure of the precedent estate. Thus if land is devised to A in fee, but if A die without children living at his death to B in fee, and A dies during the life of the testator, or his estate proves to be void for any reason, the estate of B immediately vests in possession exactly as if it were a remainder limited after a life estate in A, in the same circumstances. In the case of executory interests as of remainders any condition precedent must happen before the estate can vest in possession.¹⁷

As already explained, an estate on conditional limitation, a fee upon a fee whether created by deed or will, continues in the first taker as an absolute fee in case the second fee is void as violating the rule against perpetuities, or for any other reason, unless the first estate is a fee upon limitation or a base or qualified fee which ends in any event on the happening of the limitation on which it depends, irrespective of the validity or invalidity of the second fee.¹⁸ Where a remainder is void the precedent life estate or estates for years comes to an end at the time fixed for its natural termination, irrespective of the validity or invalidity of the remainder. This arises from the nature of the precedent estate in both cases, not from any fundamental difference between remainders and future executory interests.

15. See § 243, note 11.

16. 2 Jarman, Wills, 1358; Fenby v. Johnson, 21 Md. 111.

17. 2 Jarman Wills, 1642; In re

Miller's Will, 161 N. Y. 71; Burbank v. Whitney, 24 Pick. 146; McGreevy v. McGrath, 152 Mass. 24.

18. See § 235, note 3, *ante*.

Though executory interests could be transferred under the old law only by way of release or by estoppel or in equity, being subject to the same rules governing contingent remainders, they could always, like contingent remainders be inherited or devised.¹⁹ Under the modern statutes they may be conveyed, inherited or devised as freely as states in possession, the statutes providing for the transfer of contingent remainders applying in terms to all future executory interest as well.²⁰

It is clear, therefore, that the modern law of future estates makes no real distinction between remainders and future executory interests. The questions that may now arise as to all kinds of future estates are limited to two classes of cases—(a) cases in which the question is whether or not the future interest is subject to a condition or conditions precedent, or to conditions which will defeat the estate after it has vested, and whether or not the condition has happened in either case; (b) whether or not the future estate violates the rule against perpetuities.

19. *Jackson v. Waldron*, 13 Wend. (N. Y.) 178; *Hall v. Chaffee*, 14 N. H. 215. See § 246, *ante*.

20. See § 246, note 7.

CHAPTER XIV.

POWERS.

§ 253. **Nature And Development of Powers.**— A power is a right in any person created by the deed or will of the owner of real property, by virtue of which the donee of the power is authorized to create an estate or interest in the land, or to create a lien upon it, or to convey it for any purpose provided by the donee of the power.¹ The person creating the power, particularly in cases of powers of appointment, is called the donor, the person who is to exercise the power is called the donee, and the person in whom an estate or interest is to be created by its exercise is called the appointee.² The distinguishing feature of a power is that it operates when it is exercised and the resulting estate or interest arises, not by virtue of the deed or will made in execution of the power, but by the force and effect of the original instrument by which the power was created.

Powers as interests in land giving rise to future estates have no connection with so-called powers arising out of agency. When an agent is authorized to execute a deed or lease for his principal his act is the act of his principal, having full force and effect of itself without reference to any former instrument, while an estate created by the exercise of a power relates back to the former instrument which created the power, taking its origin and validity from that instrument. There is no agency as such involved in a real property power. Indeed, powers are usually created to be exercised after the death of the donor, which would revoke any agency in the donee.³

1. A power is an authority to do an act in relation to real property, or to the creation or revocation of an estate therein, or a charge thereon, which the owner, granting or reserving the power might himself law-

fully perform. N. Y. Real Prop. L., § 131.

2. 1 Tiffany Real Prop., 610; see Whitlock v. Washburn, 62 Hun (N. Y.) 369.

3. 4 Kent Com., 315; Sugden

The donee of the power is not a trustee. He gets no title and therefore can transfer none through his own act. His act in creating an estate in exercise of the power becomes effective only through the operation of the original deed or will creating the power.⁴

The nature of powers may be best comprehended by considering the way in which they arose historically. Before the Statute of Uses the owner of land might convey it to a trustee for the use of such persons as might be appointed by X, and thereafter, upon the appointment of the beneficiaries by X, the trustee would be compelled by equity to hold the property for their benefit, a springing use arising in their favor. In the same way the trustee might be directed to hold for the use of A and his heirs, but if A should die without issue then for the use of such person or persons as A might appoint by deed or will. On A's death without issue a shifting use would arise in favor of the persons so appointed by A. Therefore Chancellor Kent speaks of a power as "a mere right to limit a use."⁵ The Statute of Uses

Powers, 45, 199; 2 Austin Jurisp. (3d ed.), 883; Weber v. Bridgman, 113 N. Y. 600; Christy v. Pulliam, 17 Ill. 59.

4. Brown v. Higgs, 8 Ves. 570, 5 Ves. 495; Smith v. Floyd, 140 N. Y. 337; Towler v. Towler, 142 N. Y. 371; Mut. Ins. Co. v. Everett, 40 N. J. Eq. 345. See, also, § 254, notes 3 and 4, *post*, as to powers in trust.

5. 4 Kent Com. 316. "In truth they (powers) were future uses to be designated by the person to whom the power was given; these, when they arose, equity compelled the trustee to observe." Sugden Powers, 11.

One of the commonest modes of calling into operation the Statute of

Uses is by the creation of what are called *powers of appointment*, that is, conferring on a person a power of disposing of an interest in lands quite irrespective of the fact whether or not he has any interest in the land himself. * * * The estate which passes under the power of appointment comes not from the donee of the power, but from the original settler; the only difference between an interest thus created and an immediate conveyance being that, instead of the uses being declared by the original settler at the time of the conveyance of the legal estate, it is left to a third person to declare them." Digby Hist. L. Real Prop. (5th ed.), 362, 363.

turned the estates created by the exercise of such powers of appointment into legal estates, exactly as in the case of other future executory interests heretofore discussed.⁶ After the enactment of the Statute of Wills similar powers of appointment created by will were given effect under the liberal policy of the courts in construing and enforcing wills by giving effect to the intent of the testator.⁷ The estates resulting from the exercise of powers were remainders if limited after precedent estates, or executory interests if they could not take effect as remainders, exactly as with other interests created by deed under the Statute of Uses or by will, as heretofore explained.⁸

Powers may exist in connection with equitable or trust estates as well as legal estates, and are subject to the same general principles in each case.⁹ The power of sale frequently given trustees is an illustration of a legal power which not only attaches to the legal estate of the trustee, but also binds the equitable estate of the beneficiary of the trust.¹⁰

§ 254. Different Kinds of Powers.—Powers of appointment are the most important class, the law of powers having originated and developed in connection with them. These are sufficiently illustrated in the preceding section. A power of this kind is called a “general” power if the donee is given entire discretion to appoint anyone, including himself, without restriction as to the estate appointed, while it is called “special” or “limited,” if the donee is restricted to particular persons, or a particular class, or is otherwise limited as to the exercise of the power and the estates to be created thereby.¹

6. See preceding note. As to springing and shifting uses, see § 251, *ante*.

7. Litt., § 169; Co. Litt., 112b, 181b, 236a; Sugden Powers, 111-115, 147, 196.

8. 1 Tiffany Real Prop., 608. As to executory devises, see § 250, *ante*.

9. Sugden Powers, 200.

10. Lewin Trusts, 674. See § 256, *post*, as to powers in testamentary trustees to sell, etc.

1. Co. Litt., 271b; Digby Hist. L. Real Prop. (5th ed.), 363.

The exercise of a power of appointment, operating as it does by virtue of the original instrument creating the power, necessarily defeats the estates or interests of those to whom the property has passed subject thereto, and the right of dower or curtesy of the wife or husband of any such persons.²

Powers in trust, as distinguished from discretionary powers, are sometimes called imperative. In such case an imperative duty to exercise the power in favor of others is imposed on the donee, and equity regards the power as in the nature of a trust, and will compel the donee to carry it out if possible; in case of the donee's death or refusal to exercise the power, equity will cause it to be carried out as nearly as possible in accordance with the wishes of the donor.³ Thus a power of sale or of appointment or other power in favor of a class as the donee might appoint, will be enforced by equity in case of his death or refusal to act, in favor of all the members of the class in equal shares.⁴ Where the power is discretionary, resting entirely on the discretion of the donee, he cannot be compelled to exercise the power at law or in equity.⁵ So, also, where it is bene-

2. Sugden Powers, 478, 480; Christy v. Pulliam, 17 Ill. 59; 1 Scribner Dower, 294; Ray v. Pung, 5 Barn. & Ald. 561.

3. Brown v. Higgs, 8 Ves. 570, 5 Ves. 495; In re Kirwan's Trusts, L. R., 25 Ch. Div. 373; Towler v. Towler, 142 N. Y. 371; Mut. Life Ins. Co. v. Everett, 40 N. J. Eq. 345; Greenough v. Welles, 10 Cush. (Mass.) 571; Osborne v. Gordon, 86 Wis. 92.

4. 1 Perry on Trusts, §§ 250, 255; Doyley v. Atty-Gen., 2 Eq. Cas. Abr. 195.

Where a definite scheme of distribution is indicated the intention of the testator will, of course, be car-

ried out. Bull v. Bull, 8 Conn. 47. See cases in preceding note.

5. Sugden Powers, 588; Lewin Trusts, 676; 1 Perry Trusts, § 248.

In New York, and several other states which have followed New York, powers are classified as follows: N. Y. Real Prop. L., § 133. A power, as authorized in this article, is either general or special, and either beneficial or in trust. § 134. A power is general, where it authorizes the transfer or encumbrance of a fee, by either a conveyance or a will of, or a charge on the property embraced in the power, to any grantee whatever. § 135. A power is special where either: 1. The persons or class of

ficial, being solely for the benefit of the donee, it may or may not be exercised at his discretion.

The power of a life tenant to lease the property, generally for a term not to exceed twenty-one years by statutory provision, is called a power appendant, since appendant to the life estate, modifying and extending it, as the term created in exercise of the power is not brought to an end by the death of the life tenant.⁶ These are to be distinguished from powers collateral, the donee having no estate in the property, and powers in gross, the donee having an estate which, however, will not be affected by the exercise of the power, as a life tenant with power to appoint the persons who will take the property on his death.⁷

§ 255. Creation and Incidents of Powers.— Any language sufficient to express the intent to create a power, if contained

persons to whom the disposition of the property under the power is to be made are designated; or, 2. The power authorizes the transfer or encumbrance, by a conveyance, will or charge, of any estate less than a fee.

§ 136 provides that a power is beneficial when no one but the donee (called the grantee in New York) has any interest in its execution.

§ 137 provides that a general power is in trust when any person other than the donee is entitled to any proceeds or benefits from the exercise of the power, while § 138 provides that a special power is in trust when either (1) it authorizes a disposition or charge to any person or class other than the donee; or (2) when any one other than the donee is entitled to any of the proceeds or to any other benefit therefrom.

6. *Maundrell v. Maundrell*, 10 Ves. Jr., 246b. The necessity of limiting the period for which the lease may be

made is apparent. See 2 Bl. Com., 317, 323; Cruise Dig. Real Prop. L., Tit. XXXII, Ch. XV. The effect of this special power is to enhance the value of the life estate, making it possible for the life tenant to let the premises to much better advantage, since the tenancy does not depend on his life, but will continue for the full term in any event.

The N. Y. Real Prop. L., § 143, subdiv. 2, provides that such power may be granted to a tenant for life of the land to make leases thereof for not more than twenty-one years, and to commence in possession during his life. A power to make a lease for a greater period is void as to the excess. For similar statutes in Michigan, Wisconsin and other states, see 1 Stim. Am. St. L., § 1652.

7. *Edwards v. Sleater*, Hardr. 410, 415; *Sugden, Powers*, 114; *Smith v. Somes*, 1 Ch. 250.

in a deed or will sufficient to convey or create an interest in lands, is all that is required, no special form being necessary.¹ Powers will be implied though not expressly created when the power is necessary to carry out the intention of the testator. Thus an executor who is required to divide the testator's property among several persons which cannot be divided except by a sale and distribution of the proceeds, will be held to have an implied power of sale.² So where the testator directs a sale to be made, without designating the persons who shall sell, the executor has an implied power to sell where he is authorized to distribute the proceeds.³ For like reasons where property is given to a tenant for life, with a limitation of what may remain at the death of the life tenant to others, a power to use up or sell or otherwise dispose of the property is clearly implied.⁴

Where a life tenant is given a general power to dispose of the property in fee, he is substantially owner in fee since

1. 4 Kent Com. 319; Sugden Powers, 6, 102, 104.

2. Corse v. Chapman, 153 N. Y. 466; Stoffe v. McGinn, 178 Ill. 46.

3. Sugden Powers, 115, *et seq.*; Hall v. Hall, 137 Mass. 168; Lippincott's Ex'r v. Lippincott, 19 N. J. Eq. 121; Mandlebaum v. McDowell, 29 Mich. 78; Rankin v. Rankin, 36 Ill. 293.

4. Sugden, Powers 115; Paine v. Barnes, 100 Mass. 470; Henderson v. Blackburn, 104 Ill. 227; Roberts v. Lewis, 153 U. S. 367; Devoue v. Fanning, 2 Johns. Ch. (N. Y.) 252.

Whether executors who are directed to sell property and distribute the proceeds take as trustees, or as having only a power in trust, is a question of construction, turning on whether it was intended that the legal title should pass to them or not.

Where the language implies a gift of the land to the executors for the purpose of sale a trust arises, otherwise only a power in trust. Co. Litt. 113a, 181b; Moncrief v. Ross, 50 N. Y. 431, 435. In New York the statute (R. Prop. L., § 97) provides that a devise to an executor or other trustee for the purpose of sale or mortgage, where the trustee is not also empowered to receive the rents and profits, shall not vest any estate in him, the limitation taking effect as a power in trust. This is pursuant to the general scheme in New York, making all express trusts except charitable trusts and the four classes permitted by § 96, void as trusts, but giving effect to them whenever capable of being so enforced as powers in trust. See § 200, *ante*.

he may execute the power at any time in favor of himself. The courts have taken the position, however, that his creditors can reach only his life estate until after the power is exercised, and then, whether the power has been exercised in his own favor or in favor of others, his creditors may reach the entire fee on the principle that he ought to have executed the power in their favor. The only apparent reason why they cannot reach the fee before the exercise of the power is that the power may not be exercised at all, in which case the donee has only a life estate.⁵ In New York, Michigan, Wisconsin, and Minnesota, and other states it is now provided by statute that the creditors of the donee of a general power which is not a power in trust in favor of others, may reach and apply the fee to the satisfaction of their claims, the donee being regarded as owner in fee with respect to them whether he has any other estate or not, and whether or not he has executed the power. If no interest over to another is provided for in case the power should not be exercised he is absolute owner for all purposes.⁶

§ 256. Execution of Powers.—The execution of a power involving the exercise of personal discretion cannot be delegated by the donee to another, for reasons which are obvious.¹ But where no such discretion is involved, as in the case of a general power of appointment equivalent to absolute ownership, the donee may delegate the power to others in any way he pleases not in violation of the rule against perpetuities.² If the power be given to a donee “and his

5. Sugden Powers, 120-124; 4 Kent Com. 319; Clapp v. Ingraham, 126 Mass. 200; Kiefel v. Keppler, 173 Pa. St. 173.

6. This is the net result of the provisions of the New York Real Prop. Law, §§ 149-164, inc. For statutes in other states, see 1 Stim. Am. St. L., § 1656. See Ackerman v. Gorton, 67 N. Y. 63; Matter of Moehring, 154 N.

Y. 423; Swarthout v. Ranier, 143 N. Y. 499.

1. Sugden Powers, 179; 4 Kent Com. 327; Wilson v. Mason, 158 Ill. 304; Lindley v. Keim, 54 N. J. Eq. 418; Wickersham v. Savage, 58 Pa. St. 305.

2. Sugden Powers, 181, 195; Crooke v. County of Kings, 97 N. Y. 421.

assigns " it may be transferred to another to be executed by him.³

In the simple case of a power given to a person or to two or more who are not executors or trustees, the right to exercise it ends on the death of any one of them, since they must act together in the absence of an express provision to the contrary.⁴ But where a power is given to executors or trustees as a class the power may be exercised while one or more survive.⁵ If some renounce or fail to qualify for any reason the power may be exercised by the others, by virtue of the statute 21 Henry VIII, ch. 4, which has been generally reenacted or adopted in the United States.⁶

A power given to a sole or surviving trustee or executor, will not survive to his successor in the absence of statute,⁷

3. Sugden Powers, 180.

4. Tallet v. Tallet, 2 Pr. Wms. 489; Monteflon v. Brown, 7 H. L. Cas. 261; Glover v. Stillson, 56 Conn. 316; Winslow v. B. & O. R. Co., 188 U. S. 646.

5. Co. Litt. 113b; 4 Kent Com. 326; Bradford v. Monks, 132 Mass. 405 (by statute in Mass. new trustees have same powers as original trustees); Weiner v. Fath, 43 N. J. Law 1 (power exists in single surviving executor); *In re* Murphy's Est., 184 Pa. St. 310 (sole surviving executor has power).

6. Denton v. Clark, 36 N. J. Eq. 534; Warden v. Richards, 11 Gray (Mass.) 277; Wardwell v. McDowell, 31 Ill. 364; Neel v. Beach, 92 Pa. St. 221. See 4 Kent Com. 326, note d.

In New York the Real Property Law, § 166, provides that where a power is vested in two or more persons all must join in its execution; but if before its execution one or more should die the power may be executed by the survivor or survivors. This, of course, does away with the

distinctions in the text between trustees and executors and others in the execution of powers after the death of a donee, the power being subject to execution by the survivors in all cases where the testator has not expressed a contrary intent. See *Kissam v. Dierkes*, 49 N. Y. 602 (power of sale conditional on grantor's joining made void by grantor's death); *Fleming v. Burnham*, 100 N. Y. 1 (title need not be taken by vendee where one of executors with power has not renounced, or where it is doubtful whether he has renounced or not, he not having executed the deed tendered).

7. Lewin Trusts, 274, 684, 685; 1 Perry Trusts, §§ 287, 503; *Security Co. v. Snow*, 70 Conn. 288. As to statutes permitting the administrator with the will annexed to act, see *Potts v. Breneman*, 182 Pa. St. 295; *Eltner v. Fife*, 32 Oh. St. 358. In Illinois such administrator has no right to act in any case of a power. *Nicoll v. Scott*, 99 Ill. 529; *Bigelow v. Cady*, 171 Ill. 229.

unless it appear that it attached to the office and involved no personal discretion in the individual named, in which case it may be exercised by his successor.⁸

Powers coupled with an interest in the property, such as powers of sale in mortgagees, and powers in trust for the benefit of others involving an imperative duty imposed on the donees may be executed by the survivors in case of the death or incapacity of any of the donees.⁹ The intent seems clear in cases of this kind, that the power should continue in the survivors.

No particular form of instrument is required in executing a power, provided it be sufficient in form to create the interest or estate intended, whether it be in the form of a deed, will or other writing. But if it is ordered to be executed by will it cannot be executed by deed, and *vice versa*.¹⁰ At common law the utmost strictness was maintained in requiring punctilious compliance with every formality prescribed by the donor. By statute in England, New York, and many states, though it is still necessary to execute the power by deed rather than by will or by will rather than by deed, if the donor has so expressly provided, mere unessential formalities may be dispensed with, and the power is valid though some unessential illegal act is prescribed,¹¹

8. *Clifford v. Worrell*, 22 App. Div. (N. Y.) 470; *Lahey v. Kortright*, 132 N. Y. 450; *Bradford v. Monks*, 132 Mass. 405 (new trustee or executor has power of original trustee by statute); *Drummond's Adm'rs v. Jones*, 44 N. J. Eq. 43 (may be exercised by successor though discretion be involved); *Naundorf v. Schumann*, 41 N. J. Eq. 14 (power did not devolve on executrix with will annexed, discretion being involved); *Sites v. Eldredge*, 45 N. J. Eq. 632; *Bailey v. Brown*, 9 R. I. 79.

9. Co. Litt. 112b; *Osgood v. Franklin*, 2 Johns. Ch. (N. Y.) 1, 20; *Benneson v. Savage*, 130 Ill. 352.

10. 4 Kent Com. 330; *In re Jackson's Will*, L. R. 13 Ch. Div. 189; *Matter of Gardner*, 140 N. Y. 122 (general power of disposition includes power to devise as well as to convey); *Wooster v. Cooper*, 59 N. J. Eq. 204.

11. 1 Vict. c. 26; N. Y. Real Prop. L., §§ 165, 167-172; 1 Stim. Am. St. L., §§ 1658, 1959; 4 Shars & B. L. Cas. 46, 59.

the power in such case being void at common law because of the illegal act involved in its execution.¹²

Apart from mere formalities, however, the power can be executed only in accordance with the intentions of the donor carried out with exactness as to every material matter involved. Thus a mortgage cannot be made under a power of sale, or a conveyance under a power to mortgage.¹³ Nor does a power of sale create the right to exchange, or *vice versa*.¹⁴ A power of appointment among "issue" gives the right to grandchildren or other descendants as well as to children of the ancestor, though grandchildren could not be appointed if the power was to appoint children only.¹⁵

If the intent to execute the power exists, the power is validly executed though the deed or will executing it contain no reference to it.¹⁶ Where the instrument could have no other valid operation, as where the donee has no estate in the land, or a lesser estate than that conveyed by his deed, it is always given effect as a valid execution of the power.¹⁷

12. Sugden Powers, 250.

13. Woerz v. Rademacher, 120 N. Y. 62; Kent v. Morrison, 153 Mass. 137 (holding that unrestricted power of sale includes power to mortgage); Atwater v. Perkins, 51 Conn. 188; Loebenthal v. Raleigh, 36 N. J. Eq. 169; Campbell v. Foster Howe Ass'n, 163 Pa. St. 609. But where the purpose is to raise money for certain objects named it may be raised by mortgage or sale under power of sale. Loebenthal v. Raleigh, 36 N. J. Eq. 169.

14. 2 Perry Trusts, § 769; Heard v. Read, 171 Mass. 374; Woerz v. Rademacher, 120 N. Y. 62; Russell v. Russell, 36 N. Y. 581 (power of sale for benefit of legatees not well executed by a conveyance to a legatee in payment of a debt due him from the testator).

15. 4 Kent Com. 345; Horwitz v. Morris, 49 Pa. St. 213. § 172 N. Y. Real Prop. Law provides that the intention of the donor, as to time, manner and conditions of the execution of the power must be observed, subject to the power of the Supreme Court to supply a defective execution, as provided for in another section.

16. Sugden Powers, 289; Lee v. Simpson, 134 U. S. 572; Chase v. Ladd, 155 Mass. 417; Scott v. Bryan, 194 Pa. St. 41; Lockwood v. Mildeberger 159 N. Y. 181 (will purporting to dispose of all of testator's property operates as execution of power of appointment in testator unless intent to contrary appears expressly or by necessary implication).

17. White v. Hicks, 33 N. Y. 383; McCreary v. Bomberger, 151 Pa. St. 323, and cases in preceding note.

But where he has an interest in the property affected which the instrument may be reasonably construed as transferring, it will be construed as passing only that interest, unless the power is referred to in some way.¹⁸ By statute in England, New York, Pennsylvania, Michigan and several other states, it is now provided that a will by which the donee devises generally *all* of his real property will be construed as including property embraced in a power to devise, reversing the common law rule.¹⁹ Except in the case of wills, however, a transfer of "all my real estate" or "all my interest" in certain described real estate, in which the donee has an interest which could be the subject of the deed, the power is not exercised thereby, unless expressly referred to, and only the interest of the donee passes.²⁰

All conditions of execution provided for in the instrument creating the power must be complied with. If the consent of a third person to a sale under the power is required it must be secured.²¹ If a sale is to be made under the power only when required for a stated purpose, as to pay debts, or to support a person named in case of need, the debts must exist or the need must be apparent in order that a valid sale may be made.²²

Statutes in New York and some other states so expressly provide, being merely declaratory of the common law rule. N. Y. Real Prop. L., § 175; 1 Stim. Am. St. L., § 1659, 4 Shars & B. Lead. Cas. 62.

In some cases the view is taken that where the donee has a life estate, though his deed purports to convey a fee, the principle stated does not apply, his life estate only passing. *Mut. Life Ins. Co. v. Shipman*, 119 N. Y. 324; *Lardner v. Williams*, 98 Wis. 514. That this is a narrow and illiberal construction seems self-evident.

18. *Hollister v. Shaw*, 46 Conn. 248; *Meeker v. Breintnall*, 38 N. J. Eq. 345; *Harvard College v. Balch*, 171

Ill. 275; *Bingham's App.*, 64 Pa. St. 345.

19. 1 Vict. ch. 26, § 27; N. Y. Real Prop. L., § 176; 1 Stim. Am. St. L. § 1659; 4 Shars & B. Lead. Cas. 62.

20. See cases in note 18, *supra*.

21. *Sugden* 252; *Kessam v. Dierkes*, 49 N. Y. 602; *Barber v. Cary*, 11 N. Y. 397; *Richardson v. Crooker*, 73 Mass. 190.

By § 174, N. Y. R. Prop. L., as amended in 1896, where the consent of more than one third person is required, and any of such persons die, the consent of the survivors is sufficient, unless the power provides to the contrary.

22. *Griffin v. Griffin*, 141 Ill. 373;

§ 257. **Defective Execution.**—Where the donee executes a power in such way as to violate the limitations of the power it is called an “excessive” execution; as in the case of appointing an estate in fee where only a life estate is authorized, or by appointing grandchildren when the power authorizes the appointment of children only.¹ When the excessive portion can be severed from the valid portion, as in the case of including persons not authorized and the share of each person appointed is definite, only that part which is in violation of the power is void, the appointment being valid as to the others.² So a conveyance of a fee by one authorized to convey a life estate only will be valid in equity as a conveyance of a life estate, though it would be void at law.³ But where a severance of the valid from the invalid parts cannot be made the entire appointment is void.⁴

A court of equity will relieve the beneficiaries of a power from a mere defect of form or from an error not going to the essence in the execution of the power, provided they have paid value for the appointment, or a relationship exists between them and the donee; and also where the beneficiary is a charity. Thus where the seal was omitted, a sealed instrument being specified by the instrument creating the power, or where less than the required number of witnesses attested the instrument.⁵ Where the power is ordered to be

Sweeney v. Warren, 127 N. Y. 426;
Hemphill v. Pry, 183 Pa. St. 593;
Moores v. Moores, 41 N. J. L. 440;
Hull v. Culver, 34 Conn. 403; *Minot v. Prescott*, 14 Mass. 496.

1. *Sugden Powers*, 498.

2. *In re Brown's Trust*, L. R. 1 Eq. 74; *Horwitz v. Morris*, 49 Pa. St. 213 (appointment of grand children not allowed under powers in favor of children); *Hillen v. Iselin*, 144 N. Y. 365, 380.

3. *Sugden Powers*, 521; *Wicker-*

sham v. Savage, 58 Pa. St. 365. N. Y. Real Prop. L., § 177, provides that a disposition or charge more extensive than authorized by the power is valid, so far as embraced by the terms of the power.

4. *Myers v. Safe Dept. & Trust Co.*, 73 Md. 413.

5. *Mut. Life Ins. Co. v. Everett*, 40 N. J. Eq. 345; *Schenck v. Ellingwood*, 3 Edw. Ch. (N. Y.) 175; *Porter v. Turner*, 3 Serg. & R. (Pa.) 108; *Morse v. Martin*, 34 Beav. 500.

executed by deed equity will give effect to an execution by will, but a power to be executed by will cannot be carried out by deed, since a will may be revoked at any time before the death of the testator while a deed in execution of the power could not be revoked.⁶ Equity acts by requiring a conveyance of the property from those who have title subject to the power to those in whose favor the defective execution of the power has been made.

Where there has been mere failure to execute the power, no attempt to do so having been made, equity will never interfere except in cases of powers in trust where the donee is in duty bound to exercise the power in favor of the beneficiaries. A beneficial power which may be exercised by the donee for his own benefit or for the benefit of others, as well as a power in favor of others which is entirely within the discretion of the donee as to whether it will be exercised or not, will never be enforced by equity in case of non-action by the donee.⁷ But where a mandatory duty to sell or to appoint or the like for the benefit of others is imposed on the donee, he will be compelled by equity to carry it out if the court can get jurisdiction of his person; if he is dead or cannot be reached equity will execute the power as nearly as possible in accordance with the intentions of the donor.⁸

§ 258. Revocation and Extinguishment of Powers.—A power created by will cannot be revoked after the will takes

6. Sugden Powers, 558; Tollet v. Tollet, 2 P. Wms. 489; Farwell Powers, 332.

7. Sugden Powers, 392; Towler v. Towler, 142 N. Y. 371; Sites v. Eldredge, 45 N. J. Eq. 632; Security Co. v. Snow, 70 Conn. 288.

8. See § 254, note 3, *ante*.

The N. Y. Real Prop. Law, § 157, provides that "a trust power, unless its execution or non-execution is made

expressly to depend on the will of the grantee, is imperative, and imposes a duty on the grantee, the performance of which may be compelled for the benefit of the person interested. A trust power does not cease to be imperative where the grantee has the right to select any, and exclude others, of the persons designated as the beneficiaries of the trust."

effect on the death of the testator.¹ But a power created by deed without consideration may be revoked by the donor at any time, and will end on his death.² If a consideration has been paid for it, or if it is coupled with an interest in the property in which the power is to be exercised it is irrevocable.³ But after the power has once been executed the deed in execution thereof cannot be revoked, unless the right to revoke appointments is expressly reserved by the donor.

A power is extinguished, as a matter of course, by its entire execution. It is also extinguished when the object for which it was created has ceased to exist, as by the death of the beneficiary.⁴ The donee of a collateral power, viz.: where the donee has no estate or interest in the land other than the power—cannot release or extinguish it since he has nothing to release or extinguish. He may exercise it or not as he pleases provided it is not in trust, but it will continue until exercised, or until released by the beneficiary of the power.⁵ If it be *beneficial*, that is for the benefit of the donee himself, he may, of course, release and extinguish it.⁶

1. Sugden Powers, 321; 4 Kent Com. 336.

2. Id. See Terwilliger v. Ont. C. & S. R. Co., 149 N. Y. 86.

3. Id.; Hunt v. Rousmanier's Adm'r, 8 Wheat. (U. S.) 174. 207.

But the N. Y. Real Property Law, § 146, provides that "a power, whether beneficial or in trust, is irrevocable, unless an authority to revoke it is granted or reserved in the instrument creating the power."

4. Farwell Powers, 35, 36; Hetzel v. Barber, 69 N. Y. 1; Kissam v. Dierkes, 49 N. Y. 602; Fidler v. Lash, 125 Pa. St. 87.

5. Sugden Powers, 49; West v. Berney, 1 Russ. & M. 431. In England by the conveyancing act of 1881. § 52, the donee of any power may release it by deed or make a contract not to

exercise it which will extinguish it.

6. See preceding note. There would seem to be no good reason why the English statutory rule should not prevail in the United States without the aid of legislation. There is no real distinction between a collateral power and a power in gross, the exercise of which will in no way affect the donee's estate in the land. In each case, in so far as the power is concerned, the position of the donee is the same, it being immaterial in so far as the power is concerned whether the donee has a life or other estate in the land, or no estate at all, since the exercise of the power can have no effect on his estate. In any case, if it be beneficial it may be released. If not beneficial, and not in trust, it lies entirely in the discretion of the donee

A *power in gross*, in which an estate in the land is given to the donee, as an estate for life, with power to appoint the taker of the balance of the fee at his discretion, may be released by the donee and thus extinguished.⁷ But if it be a power in trust in favor of others it cannot be released or extinguished by any act of the donee, though the beneficiaries, after they have been ascertained, may release it.⁸

A power which is appendant to an estate, viz.: one which will modify the estate of the donee by its execution, may be released and extinguished at any time by act of the donee. The usual case is that of a life tenant with power to lease for twenty-one years, as heretofore explained.⁹ A conveyance of his life estate brings his power to an end since its execution thereafter would be a fraud on the grantee.¹⁰ A release of the power to the owner of the reversion or remainder extinguishes it, since it exists solely for the benefit of the tenant for life.¹¹

whether he will exercise it or not, and there seems to be no reason not purely fanciful why he should not be bound by a release by deed, or by a valid contract not to execute it.

7. Sugden Powers, 82; Albany's Case, 1 Coke, 110b; West v. Berney, 1 Russ. & M., 431; Smith v. Some, 1 Ch. 250.

8. Farwell Powers, 12, 15; Dunn's Trusts, L. R., 1 Ir. 516; Atkinson v. Dowling, 33 S. C. 414.

9. See § 254, *ante*.

10. Sugden Powers, 46, 51, 57. On a conveyance of the life estate the power passes to the grantee as appendant to the estate. See following note.

11. *Id.*; The N. Y. Real Property Law sums up the law on this point as follows (§§ 155, 156): "The power of a tenant for life to make leases is not assignable as a separate interest, but is annexed to his estate

and passes by a grant of such estate unless specially excepted. If so excepted it is extinguished." These sections further provide that the power in such case may be released to the remainderman or reversioner. A mortgage executed by the tenant for life does not extinguish the power, which is subject to the mortgage exactly as is the life estate, the mortgagee being entitled to the execution of the power so far as the satisfaction of his debt requires, and any subsequent estate created by executing the power being also subject to the mortgage. The power is not destroyed by a lease for a short term, but merely made subject to the term, as in the case of the mortgage executed by the life tenant. Stoner v. Chasse, 6 Misc. (N. Y.) 394. See Swarthout v. Ranier, 143 N. Y. 499. § 156 N. Y. R. Prop. Law.

CHAPTER XV.

THE RULE AGAINST PERPETUITIES.

§ 259. **Nature and Object of the Rule.**— The rule against perpetuities as it now exists in England and the United States, except in those states in which statutory modifications have been introduced, is as follows: Every future interest must vest, if at all, within a period measured by the lives of definite persons in existence at the time of the creation of the future interest, and twenty-one years thereafter, and every such interest is void in its creation if it may by any possibility vest at a more remote time.¹ The object of the rule is to prevent the fettering of property, real or personal, by creating future remote interests which either cannot be conveyed, or which tend to prevent or discourage alienation because they are so uncertain and indefinite that their value cannot be determined with any degree of accuracy. A future interest which cannot be conveyed or released prevents an absolute conveyance of the property affected, since its conveyance must be made subject to the future interest. Men will not purchase property subject to the possibility of losing it at any time on the happening of a contingency which will cause it to pass over to another. Even if the future contingent interest may be conveyed or released, so that an absolute estate in fee may be transferred to the purchaser by the joint conveyance to him of both the present and the future estate, or by a conveyance of the present estate followed by a release of the future interest, the difficulty of fixing a value for the future contingent interest will tend strongly to prevent any such result. The owner of the future interest, having a mere possibility, has everything to gain and little to lose, and the natural

1. Gray Perpetuities (2d ed.), § 201, *et seq.*

tendency would be for him to demand an amount for the conveyance or release of his interest out of all proportion to its true value, since no absolute conveyance could be accomplished without his concurrence. That the existence of such an interest even though alienable, tends strongly to tie up the property affected, is very clear. On the one hand the courts recognize that public policy demands the free alienation of property, on the other hand they recognize the natural desire of owners to control its future disposition. They have decided, therefore, in evolving the rule against perpetuities, that the owner may control the future disposition of his property by creating future contingent interests, provided the uncertainty on which they depend must necessarily be removed within a reasonable time, fixed by the rule as the period measured by a life or lives in being and twenty-one years thereafter. After such an interest has become vested it may be freely alienated, and its market value may be readily fixed and determined, it having become a definite part of the fee, free and clear of any uncertainty or contingency, and it no longer tending to prevent the free alienation of the property affected.²

There is some authority for the view that the rule is violated only by future interests which are inalienable and which, therefore, suspend the absolute power of alienation, for longer than lives in being and twenty-one years.³ It is very doubtful if this was ever the rule, even in the earlier stages of its development.⁴ It is now settled beyond any

2. Gray Perpetuities, §§ 268, 269, *et seq*; Madison v. Larmon, 170 Ill. 65; Owsley v. Harrison, 190 Ill. 235; Johnston's Est., 185 Pa. St. 179; Pulitzer v. Livingston, 89 Me. 359, and cases in notes following.

3. 2 Reeves Real Prop. Chapter on Perpetuities, and cases and authorities there cited.

4. It seems clear that the absolute

power of alienation was not suspended by a future executory legal interest created by way of executory devise or springing or shifting use in any case in which the person or persons to take were ascertained, because these persons could join with the other persons having vested interests in the property, and by releasing their executory interests an

doubt that the object of the rule is to prevent undue remoteness of vesting, a future contingent interest being void as too remote if it will not certainly vest, if at all, within the period fixed by the rule.⁵ Statutory modifications in New York and several other states are based on the assumption that the main object of the rule is to prevent undue suspension of the absolute power of alienation, though, as we shall see, undue remoteness of vesting is also provided against in some of these statutes.⁶

The rule has no application to present estates. A general restraint upon the alienation of any present estate, or upon any vested future estate, is void as being contrary to public policy. The tying up of property by general restraints upon alienation is prevented by the rule making such restraints void. The tying up of property by creating future remote interests is limited by the rule against perpetuities, making all such interests void unless they must necessarily vest within the period fixed by the rule.⁷

absolute fee in possession could be transferred. Yet the rule against perpetuities was developed by the courts to limit the creating of future executory interests, and there is very little authority in the English cases that the rule was to apply only to those cases of executory interests in which the person who was to take was not ascertained. Such cases as did so hold have been overruled by later cases. (See *Gray Perp.*, §§ 270-277, *inc.*) The point was that these executory interests could not be defeated by fine or recovery, and an absolute conveyance in fee could be accomplished only by the concurrent action of the persons to whom these interests were given, not against their will. It was this which made them fetters upon free alienation. Executory interests created by way

of trust in equity could be conveyed as well as released; nevertheless they were held subject to the rule. The position taken by the revisers of the New York statutes that the object of the rule was to limit the creation of only such future estates as would suspend the absolute power of alienation was simply a mistaken conception of the common law rule. That these revisers found it necessary in certain cases to provide against remoteness of vesting as will be hereafter explained, would tend to make this very clear. See § 268, note 7, § 269, *post*.

5. *Gray Perpetuities* (2d ed.), §§ 268, 269, 278, *et seq.*, and authorities there cited and discussed. See cases in note 2, *supra*.

6. See §§ 268, 269, *post*.

7. *Gray Perpetuities*, § 268.

§ 260. Origin and Historical Development of the Rule.—

The rule against perpetuities did not exist in any form before the enactment of the Statute of Uses in 1535, and the Statute of Wills in 1540. As explained in the chapter XIII, future legal estates could be created before that time only as remainders. The only future contingent interests at law that would tend to prevent the free alienation of property before the enactment of these two statutes were contingent remainders, possibilities of reverter existing in the grantor of a base fee, or a fee upon limitation as we call it to-day, and possible rights of entry for breach of condition in the grantor of an estate in fee upon condition. But contingent remainders were not recognized as valid legal limitations until the reign of Henry VI,¹ and after they had come to be recognized it was settled that they had to take effect, if at all, before the termination of the precedent life estate on which they depended, so that in the great majority of cases they would have to vest or be defeated, within the life of a person in being at the time of their creation. Though an estate to A for life, remainder to A's unborn eldest son for life, remainder in fee to X on the happening of some contingency which might happen in the remote future, would be valid and would take effect in X if the contingency should happen before the death of A's son, and would also be in violation of the rule against perpetuities as it subsequently developed, cases of this kind do not seem to have occurred. Furthermore contingent remainders could be defeated at any time by merging the fee with the ultimate reversion or vested remainder in fee, or by levying a fine or suffering a common recovery, and therefore they did not actually prevent the absolute alienation of the property affected.² No question seems ever to have been raised before the enactment of these statutes as to the validity of a remote possibility of reverter or

1. See Williams Real Prop. (17th ed.), 411. 2. Gray Perpetuities, § 134.

possible right of entry for breach of condition in connection with base or qualified fees or fees upon condition, and to this day these interests, at least in the United States, do not come within the rule.⁴ A vested remainder after an estate tail might not actually vest in possession for hundreds of years, but as the estate tail could be changed at any time into an estate in fee simple by a fine or recovery, thereby destroying the remainder, it is manifest that this interest did not tie up the property in violation of the rule as it has developed, any more than it does to-day in those jurisdictions in which estates tail still exist subject to be converted into estates in fee simple by a conveyance in fee to any other person.⁵

But the Statute of Uses and the Statute of Wills permitted the creation of all sorts of future executory interests which had not been known theretofore except as uses in equity. A future interest to arise on the happening of some event in the remote future without any precedent estate, a fee limited after another fee to take effect at a very remote time, and the other executory interests discussed in the preceding chapter, could be created under these statutes, as springing or shifting uses or executory devises.⁶ Interests of this sort might be created which would not actually take effect or be rendered certain and definite for hundreds of years after their creation, effectually tying up the property involved during all the time intervening. Cases involving this situation did not arise with any frequency until some considerable time after these statutes were enacted. Gradually the rule became established that future executory interests created by springing or shifting use or by executory devise could not be destroyed by the levying of a fine or the suffering of a common recovery or by the destruction or termination of any precedent estate.⁷

4. See § 262c, *post*.

5. See § 262, *post*.

6. See §§ 250, 251, *ante*.

7. Gray Perpetuities (2d ed.), §§ 142-147,

By a slow and gradual process the courts finally recognized the need of in some way limiting the time in which future executory interests should vest, until in the *Duke of Norfolk's case*,⁸ decided by the House of Lords in 1685, one hundred and fifty years after the Statute of Uses was enacted, it was finally settled as law that a future executory interest must be limited on a contingency which must happen, if ever, within the life of some person in being at the time the future interest was created. Thereafter by a series of cases culminating in *Stephens v. Stephens*,⁹ decided in 1736, it was decided that to the period of a life or lives in being should be added the period in which a posthumous child could be born and also the actual minority of a child or children, as in the case of a gift to the child or children of a living person upon their attaining the age of twenty-one. The extension of the period to a flat term of twenty-one years, irrespective of whether an actual minority of any person was involved or not, was not actually accomplished until the case of *Cadell v. Palmer* was decided by the House of Lords in 1832,¹⁰ though the rule had been so laid down by the vice-chancellor in the same case in 1826.¹¹ It seems clear that this final extension of the rule was the result of accident rather than from the application of any controlling reason. The rule in its final form, as stated in the preceding section, has been accepted since that time in England and in the United States, except in those states where modifications have been made by statute.¹²

§ 261. Elements of the Rule. (a) *The Estate Must Be Certain to Vest Within the Required Period.*—If at the time of the delivery of the deed or the testator's death there be any uncertainty as to whether the estate will vest or not within

8. 3 Ch. Cas. 1; Gray Perp., § 169.

11. 1 Sim. 267; Gray Perp., § 185.

9. Cas. Temp. Talb., 228; Gray Perp., § 175.

12. Gray Perp. (2d ed.), §§ 200, 200a.

10. 1 Sim. 123.

the limits fixed by the rule it is void in its creation. It is immaterial how soon the future estate may actually vest after the taking effect of the deed or will creating it; if by possibility it might not have vested within the required limits of lives in being and twenty-one years from the time the instrument creating it took effect it is void. Thus where a remainder after life estates was given by way of trust to such son of one McDonald as should live to attain the age of twenty-five, the remainder was void though at the death of the testator McDonald had a son who attained the age of twenty-five before the death of the life tenants, and well within the period of twenty-one years. The difficulty was that at the testator's death when the will took effect it was possible that McDonald's son should die, that thereafter another son might be born to him, and that McDonald might die within four years thereafter, so that this second son would not attain the age of twenty-five and his interest vest within twenty-one years after his father's death.¹

1. *Abbiss v. Burney*, 17 Ch. Div. 211; *Gray Perpetuities* (2d ed.), § 214, *et seq.* A good illustration of this rule is given by Prof. Gray. Property is devised to A for life, remainder to his widow for life, remainder over in case the widow should die without children surviving. The remainder over is void unless it appears by the context that the present wife of A was intended as the second life tenant. A might marry a woman not yet born, who would become his widow, and the remainder over might not vest until more than twenty-one years after the death of A.

See *Brandenburgh v. Thorndike*, 139 Mass. 102 and *Belfield v. Booth*, 63 Conn. 299. In the first case a final division was directed to be made, after the death of the testa-

tor's wife and after such further time as might be required by the trustees to finally settle his estate, among a class then to be determined. The court took the view that in no event could the executors delay the settlement for more than twenty-one years after the death of the wife. In the second case a similar direction was given to divide among a class to be determined at the expiration of fourteen years and after the executor had settled with the judge of probate. The court held the gift valid, as such settlement ought to be made within one year, and would certainly be made within seven years, or within 21 years after the death of the testator. As in each of these cases it was possible that the executors could not settle the estate within the time fixed by the rule, a literal applica-

(b) *Lives in Being.* The rule is intended to apply in the most flexible way to each case, the lives of the persons who happen to be involved measuring the period of suspension of vesting.² The case last referred to in the text is a good illustration. McDonald's life was the only one in that case measuring the period of suspension, the remainder being limited to such son of his as would first attain the age of twenty-five. Nine months after McDonald's death the possibility of another son being born to him would be gone; his life alone is involved in determining the contingency on which the gift depends, and it must vest within twenty-one years and nine months after his death. The lives of the prior life tenants in no way measured the period, since the vesting of the remainder did not at all depend on when they should die.³ Where a gift is made to several tenants for life in being, either in common or successively, remainder over to the children of the survivor, the lives measuring the period are those of the life tenants. Any lives however, may be taken as measuring the period, though of strangers in no way interested in the property, provided a reasonable number of lives are so taken, so that the fact of the death of all of them may be readily proved. Thus a gift to Bailey in fee, but upon the incorporation of Gloversville, then to Gloversville in fee, provided Gloversville be incorporated during the lives of Jones and Smith, two persons in being at the time the deed or will takes effect, is valid, though the gift to Gloversville would be clearly void except for the provision that the contingency of the incorporation of Gloversville must happen within the lives of the

tion of it would render these gifts void. These cases show a commendable tendency to get away from the purely technical and arbitrary application of the rule which has been common in the past. The beneficial purpose of the rule should always be borne in mind, and where the possi-

bility of undue remoteness of vesting is very slight, it may well be disregarded, as in these cases.

2. Gray Perp. (2d ed.), §§ 216-219, and cases there discussed.

3. *Abbiss v. Burney*, 17 Ch. Div. 211, discussed in text above.

persons so named.^{3a} Any number of persons may be named in this way, provided the number is reasonably limited to persons the death of whom could readily be established. If the lives of all the persons then living in the world, or in a stated town or the like were taken, the future interest would not be saved, because the death of all such persons could be proved only with great difficulty, and therefore the limitation would prevent alienation for a longer period than the lives of such persons because of the practical difficulty or impossibility of proving that they had all died.⁴

The ill effects of limiting the period arbitrarily to two lives by statute in New York and other states will be considered hereafter.⁵

(c) *A Future Interest is Valid if it Must Vest Within Twenty-one Years.* Where the lives of no persons are involved, so that the period of suspension is in no way measured by lives, the future interest must be certain to vest within twenty-one years from the testator's death or the delivery of the deed, as the case may be. Therefore every future interest which must vest if at all within a flat term of twenty-one years is always valid. But if the vesting is or may be postponed for a longer period not measured by lives in being, it is void. Thus a limitation after a term of fifty years to such persons as might then be the heirs of the testator was void, the contingent interests after the term not vesting in any case until fifty years had passed.⁶ If it had been

3a. See N. Y. cases cited in following chapter, § 272, note 2.

4. *Thellusson v. Woodford*, 4 Ves 244, 277, 278, 290; *Gray Perp.*, §§ 217-219.

5. See § 269, note 11, *post*.

6. *Johnston's Est.*, 185 Pa. St. 179; *Gray Perpetuities*, §§ 225-229.

A provision in a lease for a perpetual renewal at the option of the tenant does not violate the rule and

is valid. *Blackmore v. Boardman*, 28 Mo. 420; *Gray Perpetuities*, § 230. and cases cited. Prof. Gray points out that the privilege of renewal is merely an incident of the term of years vested in the tenant. It may or may not be exercised by him at the end of the term, or at the end of any renewed term. Will such a provision tend to take the property affected out of commerce? Where the

provided that the fifty year term should end and the future interests vest on the death of any person or persons named by the testator, the future estates would have been valid, since they would necessarily have vested within a period measured by the lives of persons in being at the time they were created.

(d) *The Period of Gestation is Always Added to the Period of Suspension Allowed by the Rule.* A child *en ventre sa mere* is regarded as a life in existence for the purposes of the rule.⁷ Often two such periods are involved, suspending the vesting of a future interest for lives in being and twenty-one years and in addition two periods of nine months or a fraction thereof. Thus if A makes a gift by will to his children for life, and on their death to their children, but in case these grandchildren die under twenty-one then to X in fee, if a posthumous child is born to the testator, and a posthumous child is born to that child, X's interest will not vest until twenty-one years and possibly nine months after the death of the testator's posthumous child, regarding such child as a life in being at the testator's death because then *en ventre sa mere*.⁸

(e) *If the Future Interest Begins Within the Required Limits it is Valid.* If the future interest must vest within the limits fixed by the rule, it is quite immaterial how long it may continue, whether for a term of years of any duration, for life or lives, or in fee. The interest having vested, it is

usual relation of landlord and tenant exists, and the rent reserved or to be reserved represents the approximate rental value of the property, it is difficult to see how it could have any such effect. The value of the interest of both parties is readily ascertainable, and each interest may be readily conveyed. See Gray Perpetuities (2d ed.), §§ 230, 230a.

An option to purchase the property

in fee given to a tenant for years so that it may be exercised at too remote a time is void since it gives rise to a contingent equitable future interest which is not a mere incident of the term. See Gray Perp. (2d ed.), § 230b.

7. Gray Perp. (2d ed.), § 220, *et seq.*; Marsh v. Reed, 184 Ill. 263.

8. Gray Perp. (2d ed.), § 221.

no longer uncertain but a definite estate which may be readily conveyed at a value which may be easily determined, and it in no way tends to tie up the property. The rule does not apply to a vested interest, which never suspends or tends to suspend the absolute power of alienation and for that reason cannot be a perpetuity. Therefore a life estate to an unborn person who must be born within a life in being is good, the estate vesting on his birth⁹ and a term of years to arise in the future but within the limits fixed by the rule is also valid, there being no further suspension after the term vests.

In *Fosdick v. Fosdick* (6 Allen, Mass., 41), the testatrix gave her residuary estate to trustees in trust to accumulate the income until her youngest living grandchild should attain the age of twenty-one, thereafter the income to be paid over annually to her grandchildren in equal shares. She was survived by one daughter. The gift to the grandchildren, vesting in them on the youngest attaining twenty-one, was bound to vest within twenty-one years after the daughter's death, and was therefore valid. The court, however, held that it was void, since the grandchildren would not be entitled to receive the first installment of income until the end of the first year after the youngest had attained twenty-one, the additional year being required in order that the income might accrue, which would be a year over the limits fixed by the rule. Of course the grandchildren's interest would be vested as soon as the youngest attained twenty-one, and there would be no further possible suspension. The decision is clearly wrong.

§ 262. Interests Affected by the Rule. (a) *Executory Interests.* The rule grew up as a direct result of the Statute of Uses and the Statute of Wills, and of executory future interests by way of springing and shifting use and executory devise which were provided for and permitted by these

9. See English cases cited in Gray's *Perp.* (2d ed.), § 232.

statutes.¹ Such interests in nearly all cases depend on some future contingency as a condition precedent which makes them uncertain and indefinite. In some cases, however, they may be as certain and definite as any vested remainder, such as an estate granted to X to take effect in possession on the death of the grantor, or ten years from date, or on any other event sure to happen. Nevertheless, even in such cases, they were not regarded as vested interests; the entire fee remained in the grantor until the day arrived on which the future interest was to take effect, on which day the future estate was said to be "executed" and to go over for the first time from the grantor to the grantee.²

It is, of course, perfectly clear that the rule applies to all future executory interests depending on a future contingency. As we have seen, the possibility of tying up property for hundreds of years by creating future executory interests of this nature dependent on contingencies which might not happen until the remote future was the immediate cause of the development of the rule. Therefore every future interest to spring up in another on the happening of some contingency, every fee upon a fee to take effect on a contingency, and each of the other executory interests as discussed in the last chapter, must be so limited that the contingency on which they depend must happen within a life or lives in being at the time the deed or will creating them takes effect, and twenty-one years and a possible nine months thereafter, otherwise they are void.³ This seems to have been the law also as to executory interests which

1. See § 260, *ante*.

2. See § 252, notes 6 and 7, *ante*.

3. Gray Perp. (2d ed.), § 317; Proprietors of Church in Brattle Sq. v. Grant, 3 Gray (Mass.) 142; Society for Theolog. Education v. A. G., 135 Mass. 285; Winsor v. Mills, 157 Mass. 362; Brown & Sibley's Contr., 3 Ch. Div. 156. In above

cases the limitation over was to a living person who could release it, so that the absolute power of alienation was not suspended. It is quite immaterial whether the person to whom the limitation over is made is ascertained or not for the purposes of the rule.

were sure to take effect, as above explained, depending on no contingency, following logically from the rule that these interests were purely executory, the entire fee remaining during the interval in the grantor or heirs of the devisor.⁴ But, as we have already seen,⁵ all difference and distinction between executory interests and remainders have been swept away by statute in many states, and in other states by decision, the courts recognizing that the ancient feudal reasons for such distinctions having ceased to exist, the distinctions themselves should be disregarded. On principle there is no reason whatever why these distinctions should be longer recognized anywhere, and every consideration of good policy, clearness and simplicity of the law, as well as of good sense would seem to require that remainders and executory interests be treated in exactly the same way. In those states in which these distinctions have been abolished future executory interests that depend on no contingency are vested, and in no way violate the rule.⁶ It is believed that in nearly all the other states this is now the law, or will be after the question has been raised and fairly presented.⁷

4. Gray Perp. (2d ed.), § 114, the author stating that future executory interests, though dependent on no contingency, are not vested, and do not become vested until they take effect in possession or are turned into vested remainders, and § 317 of the same work, stating that the rule unquestionably applies to *all* executory devises and springing and shifting uses, no authorities being cited apparently because the point is regarded as settled beyond dispute.

5. § 252, *ante*, and citations.

6. In New York and several of the other states the matter is complicated by the fact that suspension of the absolute power of alienation

rather than remoteness of vesting is regarded as the basis of the rule. Of course there is no suspension caused by a certain and definite future executory interest such as those referred to in the text. Not only may they be freely conveyed, but their value may be fixed with the same certainty as the value of a vested remainder, and, therefore, they do not tend to discourage alienation any more than do vested remainders. No reason whatever can be given for treating these interests as subject to the rule. See discussion of statutory changes in the Rule, § 269, *post*.

7. See preceding note.

These executory interests could not be conveyed at common law, but they could always be released, and therefore they never caused a suspension of the absolute power of alienation when limited to ascertained persons, because by joint action of all parties interested the entire fee in possession could be conveyed. The only case in which the absolute power of alienation was suspended by these interests was where the person to take was not ascertained so that he could not release his interest. As we saw in the last chapter, these interests may now be freely conveyed. It is very clear, therefore, that undue remoteness of vesting, and not undue suspension of the absolute power of alienation was the object of the common law rule. Though these interests may now be freely conveyed, and therefore in no way suspend the absolute power of alienation, except in the case where the person or persons to take remain unascertained, they are void unless they must vest within the limits fixed by the rule.⁸

(b) *Remainders and Reversions.* Vested remainders, and reversions which are always necessarily vested are in no way affected by the rule. No matter how long actual enjoyment of the property may be postponed, if the interest of the remainderman is vested it may be readily conveyed and its value may be readily ascertained, so that it does not tend to tie up the property. Thus where a vested remainder follows contingent remainders to unborn persons, it is valid because vested, though it would be void if contingent since it might not vest within lives in being and twenty-one years.⁹

8. See note 3, preceding.

9. *Evans v. Walker*, 3 Ch. Div. 211; *Johnston's Est.*, 185 Pa. St. 179; *Gray Perp.* (2d ed.), § 205.

A case of a vested remainder which may nevertheless violate the rule is given by Prof. Gray, § 205a,

of his work on *Perpetuities* (2d ed.).

If a devise is made to A for life, remainder to the children of B who attain the age of twenty-five, and at the testator's death B is living and has a son, C, who is twenty-five years old, the remainder vests in such son,

On the other hand contingent remainders come directly within the rule. It is true that the rule developed in connection with executory estates, the need for it being much greater as a result of the statutes permitting the creation of these interests. But contingent remainders, particularly after the laws affecting them were changed so that they could no longer be defeated by fine or recovery or by the destruction or termination of the prior life estate, came directly within the mischief sought to be prevented by the rule, and it is now universally the law in common law states, that a contingent remainder is void which will not certainly vest within the period fixed by the rule.¹⁰ In New

and the class is closed, so that children of B subsequently born will not be admitted to the class. But if B has other children who are under the age of four at the testator's death, their interests will not vest and the maximum amount of C's share cannot be determined until more than twenty-one years after B's death. But is this material? Since C has attained the age of twenty-five at the testator's death, only those of B's children then in being can take as members of the class. Their interest must vest and the maximum share of each must be determined within their lives, and therefore within lives in being. C has a vested remainder in an undivided share of the balance of the fee. The other children have a contingent remainder in the balance of the fee, contingent because it depends upon their attaining the age of twenty-five. This must happen, if ever, within their lives and the gift to them does not violate the rule. The testator undoubtedly intended that if these children should die before attaining the age of twenty-five the entire estate in remainder should

vest in C. This also must happen during the lives of the other children, lives in being at the testator's death. It would seem clear, therefore, that these remainders are valid since children subsequently born to B must be excluded from the class, and the gifts to the then living children of B must vest, if ever, within their lives. See *Gray Perp.*, § 379.

It is difficult to imagine a case of a remainder to a class vested in a member thereof which can violate the rule, because if the limitation is to children of a living person the children will be ascertained during a life in being, and if an additional precedent contingency is provided, such as their attaining the age of twenty-five, or other contingency to happen after they attain twenty-one, the contingency must have happened as to one of the class at the time of the testator's death, in order that the interest of one of the class may be vested, in which case the class is closed and subsequently born children cannot be admitted.

10. *Abbiss v. Burney*, 17 Ch. Div. 211; *In re Frost*, 43 Ch. Div. 246;

York and those states which have adopted the New York statutory scheme the law is different, as will be explained hereafter.¹¹

A remainder in fee after an estate tail is vested and therefore does not violate the rule. It is not the remainder in this case that ties up the property, but the prior estate tail. The law provided against this by permitting the tenant in tail to bar the entail by a fine or recovery, changing the estate tail into a fee simple, and thereby defeating the remainder. At the present time in jurisdictions in which estates tail still exist, they may be changed into estates in fee simple, de-

London & S. W. R. Co. v. Gomm, 20 Ch. Div. 562; Lewis Perp., ch. 16; Winsor v. Mills, 157 Mass. 362; Madison v. Larmon, 170 Ill. 65; Wood v. Griffin, 46 N. H. 230; Fosdick v. Fosdick, 6 Allen (Mass.) 41; Stout v. Stout, 44 N. J. Eq. 479; Gray Perp. (2d ed.), §§ 284-298h.

It has been urged that contingent remainders do not come within the rule because they were valid at common law before the enactment of the Statute of Uses and the Statute of Wills, the rule having been developed to restrain the creation of executory interests under these statutes only, they being indestructible while contingent remainders were destructible at any time by fine or recovery or the destruction of the precedent estate on which the contingent remainder depended by merger, forfeiture, etc. Prof. Gray establishes beyond question that this argument is not sound historically because the rule was developed in the applying of it to future interests in personal property, chattels and chattels real, which could always be limited by will or *inter vivos* before

these statutes in any of the ways in which executory interests could be created after these statutes were enacted. Furthermore, the rule has been always held to apply to equitable executory interests which were just as valid before these statutes as after. There can be no question that the rule was developed as a general rule of public policy to limit the creation of all future contingent interests to those which would certainly vest within lives in being and twenty-one years, whether they happened to be interests made possible by the statutes above referred to, or were interests recognized as valid before these statutes were enacted. Gray Perp. (2d ed.), §§ 296-298.

The argument that contingent remainders were destructible and therefore did not violate the rule, no longer has any application as by statute in England and generally in the United States, they are now indestructible and come within the reason of the rule to exactly the same extent as executory interests. Gray Perp. (2d ed.), § 286. See § 244, *ante*.

11. See Ch. XVI, *post*.

feating the remainder, by a simple conveyance in fee. In such case the property is in no sense tied up¹²

(e) *Possible Rights of Reverter and of Entry for Breach of Condition.* That such possible rights of entry to enforce a forfeiture of estates in fee for breach of condition are within the mischief sought to be prevented by the rule seems clear. Men will hesitate to purchase property subject to a contingency on the happening of which the estate may be forfeited. Therefore the contingency should be one which must happen if at all within the period fixed by the rule in order that the property may not be rendered inalienable, or its transfer discouraged for too long a time.¹³ In these cases as in others arising before the enactment of the Statutes of Uses there was no suggestion of the application of any rule limiting the reservation of rights of entry in any way. That rights of entry for breach of condition comes within the rule seems to be settled in England to-day, though there is some authority to the contrary.¹⁴ In the United States it is well settled, though without any adequate discussion and without the giving of any adequate reason therefor, that the rule does not apply to these interests.¹⁵

12. Gray Perpetuities, §§ 443, 447, and cases there cited.

13. Gray Perp. (2d ed.), §§ 299-304.

14. Dunn v. Flood, 25 Ch. Div. 629, 28 Ch. Div. 586, 592; *In re Hollis's Hospital*, 2 Ch. 540; *In re Mailcay*, L. R. 20 Eq. 186 (dicta). The question does not seem to have arisen in the earlier cases, nevertheless the English Real Property Commissioners in their third report, p. 36, say that such rights of entry seem not to be subject to the rule, but that "they are clearly within the policy which the law has adopted with respect to perpetuities." Gray Perp. (2d ed.), §§ 299, 300.

15. *Church in Brattle Sq. v. Grant*, 3 Gray (Mass.) 142, 148 (dictum); *Hunt v. Wright*, 47 N. H. 396; *French v. Old South Soc.*, 106 Mass. 479; *Tobey v. Moore*, 130 Mass. 448 (dictum); Gray Perp. (2d ed.), § 305.

See long list of cases cited in Gray Perp. (2d ed.), § 306, note 6, in which rights of entry for condition broken were held to be valid, though they violated the rule against perpetuities, no question as to whether the rule applied or not having been raised by court or counsel. Among the more important of these cases are *Upington v. Corrigan*, 151 N. Y. 143; *Cowell v. Springs Co.*, 100 U. S. 55; *Langley*

Where the conditional estate is an estate for life or a tenancy for years no matter of what duration, no question of remoteness can arise because the possible right of entry goes with the vested reversion as an inseparable incident.

Possibilities of reverter in connection with estates in fee upon limitation, or base fees as they are sometimes called, come within the mischief sought to be prevented by the rule for the same reasons. But it is undoubtedly the law, by weight of authority, that the rule does not apply to them, so that they are valid though the contingency on which they depend be very remote.¹⁶ It is true that these

v. Chapin, 134 Mass. 82; *Smith v. Barrie*, 56 Mich. 314; *Sioux City St. R. Co. v. Singer*, 49 Minn. 301; *Cornelius v. Ivins*, 26 N. J. Law 376; *Sperry v. Pond*, 5 Ohio 387; *Pickle v. McKissick*, 21 Pa. St. 232. The question seems to have gone by default. It is so firmly settled, however, as an established law of property that the rule does not apply to these cases that a change can be accomplished only by legislation, which would seem to be very desirable.

16. *First Univ. Soc. v. Boland*, 155 Mass. 171; *Leonard v. Burr*, 18 N. Y. 96 (question not raised though involved in decision enforcing possibility of reverter which was too remote).

Prof. Gray states that remote possibilities of reverter are a necessity if estates on limitation in fee or determinable fees are allowed at all (*Gray Perp.* (2d ed.), § 312). But why permit the creation of interests by way of reservation, or if you please, by operation of law as a result of creating a determinable fee, which will tie up the property for too long a time as effectually as a conditional limitation?

It is not necessary to abolish conditional limitations because some of them may be too remote, and it is submitted that it is unnecessary to declare determinable fees void for any such reason, nor even for a reason which goes back to conditions existing before the enactment of the Statute *Quia Emptores* in 1289, and which have been as a practical matter obsolete for hundreds of years. There has been too much clinging to the doctrines of tenure and seisin, and to rules dependent on the feudal relation, all of which have had no real reason for existence or recognition since the disappearance of feudalism. Most of the unnecessary, artificial and perplexing technicalities of the law of future estates are due to this. The courts have fortunately overlooked one technical possibility in recognizing determinable fees as valid, irrespective of the doctrine of tenure. They should, however, have limited possibilities of reverter by applying to them the rule against Perpetuities, and having failed to do so, that result, as to interests created in the future, should be accomplished by statute.

interests, as well as possible rights of entry for breach of condition, were valid at common law long before the rule was thought of, and that they could be released, so that with the aid of a release of such an interest an absolute fee could be conveyed by the joint action of all parties interested in the property. But all that is also true of contingent remainders and of executory uses before the Statute of Uses, yet contingent remainders and future trust estates to-day are unquestionably subject to the rule. All valid objection to the recognizing of fees upon limitation would disappear if the rule should be extended so as to make it apply to these interests. It is highly important that property be not tied up by possibilities of reverter or by possible rights of entry for breach of condition for a longer period than lives in being and twenty-one years. The rule should be extended by statute to both of these future contingent interests, since they have exactly the same effect in restraining or discouraging alienation as have contingent remainders and contingent executory interests. It seems clear that the law is too firmly settled to permit of change by decision affecting interests heretofore created.

(d) *Equitable Estates.* Trust estates, or estates in equity, are subject to the rule exactly as legal estates. It is clearly recognized in the cases and by the leading writers that no distinction exists between contingent equitable remainders and executory equitable interests, since contingent remainders do not require a precedent life estate to support them, seisin never being in abeyance because always in the trustee.¹⁷ But by the modern law in nearly all jurisdictions legal contingent remainders no longer require a precedent life estate to make them valid.¹⁸ It follows beyond the possibility of doubt that no distinction should be made between contingent remainders and executory future interests at law

17. *Abbiss v. Burney*, 17 Ch. Div. 211; *Gray Perp.* (2d ed.), § 324.

18. See § 244, *ante*.

any more than in equity. Whether the future interest be a contingent remainder or an executory interest, whether legal or equitable, it is subject to the rule in exactly the same way.

A vested trust estate like a vested legal estate does not violate the rule, irrespective of the period for which it may continue. The peculiar situation in New York and a few other states arising out of the inalienability of express trusts to collect and apply the rents and profits for life or for a shorter term will be considered hereafter.¹⁹

(e) *Personal Property*. The rule applies to gifts of personalty exactly as to gifts of realty.²⁰ Statutory differences in some states are noted hereafter.²¹

§ 263. Gifts to a Class.—The application of the rule is well illustrated by gifts to classes. A gift to the grandchildren of the testator who shall attain the age of twenty-five, or other age exceeding twenty-one, is void, as is a gift to the children of some third person who live to attain to any stated age exceeding twenty-one. The children who may qualify as members of the class may be born after the testator's death and the parent of the children subsequently born may die before such children attain the age of four years, so that their interest will not vest within twenty-one years after the death of the parent or parents, whose lives are the "lives in being" involved in the case.¹

19. See § 271, *post*.

20. See cases and authorities heretofore cited, many of which relate to future limitations of chattels and chattels real, or tenancies for years. Exactly the same considerations apply to future remote interests of personalty as apply to such interests in real property, and there is at least equal reason in public policy why the same law should govern. See Gray *Perp.* (2d ed.), §§ 319-321b.

21. See §§ 272, 273, *post*.

1. *Wilkinson v. Duncan*, 30 Beav. 111; *Leake v. Robinson*, 2 Mer. 363. See long list of English cases cited in Gray *Perp.* (2d ed.), § 374, note 1; *Coggins' App.*, 124 Pa. St. 10. See, also, cases cited in notes following.

Where land is devised to A for life, remainder to such of his children as attain the age of twenty-five, and at the testator's death A is living and has children then living, these chil-

If the age to be reached as a condition precedent to the vesting of the estate is twenty-one or less the limitation is good, since it must vest within twenty-one years after the death of the parent or parents.²

Where a life estate is given to A, remainder to such of his children as attain twenty-five, and A dies before the testator leaving children all of whom are four years old or over, the gift is good, since the limitation must vest, if at

dren have contingent remainders which must vest, if at all, during their lives. The testator undoubtedly intended that these children should have the entire property divided between them in remainder, provided they should attain the age of twenty-five, and other children should not be born to A. He also intended that their shares should be defeated by their death before attaining twenty-five, but as this contingency must be determined during their lives, it cannot affect the validity of the gift. The contingent remainders to the children of A not yet born are concededly void as violating the rule, since such children may not attain the age of twenty-five within twenty-one years after the death of A. If the interests of these children can be separated from the interests of the children in existence at the testator's death, the interests of the latter may be preserved without violating the rule. It is true that the testator intended that the share of each child then in existence, should be diminished by the birth of other children. But as to the children in existence, their shares must either be defeated or become certain within their lives, for upon any child's becoming twenty-five the class is closed, and subsequently born children cannot be ad-

mitted, so that the share of any child in existence at the testator's death could not be diminished thereafter by the birth of other children. But his share may be increased by the death of a child born after the death of the testator, and it was the testator's intent that his share should be so increased in that event. To that extent the limitation would also be void as violating the rule. The gift to the living children is in all respects within the rule except as to such increase in their shares as may result from the death of children subsequently born. It is difficult to see why this contingent and improbable interest may not be separated from the balance of the gift to the living children, making void only the gift to children to be subsequently born, and the division of their shares among the others in case of their death before attaining twenty-five. The law seems settled to the contrary, however. See *Gray Perp.* (2d ed.), §§ 382, 385.

2. *Woodruff v. Pleasants*, 81 Va. 37; *Gray Perp.* (2d ed.), § 370.

A gift to grandchildren of a living person other than the testator who live to attain the age of twenty-one is bad because that person may have children after the testator's death who may have children that will at-

all, within twenty-one years, it being impossible that any children be subsequently born who would be members of the class.³ So if at the time of the testator's death A is living, but one of his children has attained the age of twenty-five (or other age as required by the will), the class is then closed, and no child subsequently born to A will be entitled to take. The gift is good, because no child subsequently born will be entitled to take, and the gift must vest within the lives of the children living at the death of the testator.⁴ The same result follows in any case in which the gift is limited to persons living at the testator's death.

Where the estate is to vest in the children or members of the class living at the parent's death, or within a period not too remote subject to be divested and to go over to the others in case of the death of any child before attaining twenty-five, the rule is not violated because the estate vests within the limits of the rule, subject to be divested by the happening of the contingency. If the gift is not to vest until the children attain the age of twenty-five (or any other age over twenty-one), the rule is violated, as in the cases above discussed.

The extreme technicality of the rule that the interest must be one which by no possibility may suspend vesting for longer than the period fixed by the rule is illustrated by a gift to such of the children of a woman as attain twenty-five. Though the woman be far past the age of possible child-bearing the gift is void, since for the purposes of the rule the woman is regarded as capable of giving birth to children as long as she lives.⁵

Where separate and distinct gifts are made to a class of

tain the age of twenty-one long after the expiration of lives in being and twenty-one years after testator's death. *Belfield v. Booth*, 63 Conn. 299; *Gray Perp. id.* § 370.

3. *Southern v. Wollaston*, 16 Beav. 276.

4. *Picken v. Matthews*, 10 Ch. Div. 264; *Gray Perp.* (2d ed.), § 379, notes 1 and 2.

5. *Jee v. Audley*, 1 Cox Ch. 324; *Gray Perp.* (2d ed.), § 215. See, also, *Stout v. Stout*, 44 N. J. Eq. 479; *Re Dawson*, 39 Ch. Div. 155.

persons, separable as to each member of the class, it is good as to those members whose portion must vest within lives in being and twenty-one years, and is void only as to those members whose interests may not vest within that period. Thus where the testator provided that his property should be held in trust for his nephew for life, and on his death to be divided among his nephew's children as the nephew should appoint by deed or will, and the nephew in his will directed that £2,000 be paid to each of his daughters when they should attain the age of twenty-four, and the residue to be divided among his sons when they should respectively attain the age of twenty-four, the gift to the daughters over three years of age was good, since they must attain twenty-four, if ever, within twenty-one years after the father's death, the share of each being definite and therefore separable, but the gift to the sons was void, since some of the sons were under three years of age at his death, and the shares of all of them might not be determined within twenty-one years after the father's death.⁶

6. *Wilkinson v. Duncan*, 30 Beav. 111; *Gray Perp.* (2d ed.), §§ 389, 391.

In any case in which the number of the shares is definitely fixed within lives in being and twenty-one years, each share must be considered separately, those interests certain to vest within the required limits being valid, and those not so vesting being invalid. Thus in *Hills v. Simonds*, 125 Mass. 536, the testator devised property to the children of his brothers and sisters in equal shares for life, and on the death of each brother and sister the share of the one so dying to go to his or her children or their legal representatives. The gift to the children of such brothers and sisters as were in existence at testator's death or their legal representatives, was valid. Each brother and sister took as ten-

ant in common for life, remainder to his or her heirs. Each share must be considered, therefore, as a separate limitation, the remainder in each case being void or valid depending on whether it will vest within the required limits. So in *Dort v. Lovering*, 147 Mass. 530, overruling *Lovering v. Lovering*, 129 Mass. 97, and *Sears v. Russell*, 8 Gray (Mass.) 86, the court took the same position, the testator having created a trust for his daughter Nancy for life, and on her death for Nancy's children for life, and on the death of any child of Nancy its share to go in fee to the children of such child. The court held that as Nancy's children were all born before testator's death the remainder to the children of each child was good since it must vest within a life in being.

§ 264. Powers.—The rule against perpetuities is violated by a power which can, by possibility, be exercised at too remote a time, viz.: some time after the expiration of lives in being and twenty-one years after the taking effect of the instrument creating the powers.⁸ The interest to be created by the power may not vest in such case within the required limits. Though the contingency on which the power is to be executed may happen after lives in being and twenty-one years and therefore is too remote, nevertheless the power is good if it can be exercised only by a person or persons in being when the power was created, since in such case it must be exercised, if at all, within lives in being.⁹ But a power given to a living person to create a contingent estate depending on a contingency which may not happen within lives in being and twenty-one years after the taking effect of the instrument creating the power is void, since the future interest created by the power might not vest within lives in being and twenty-one years from the time the power was created.¹⁰

The gift would be void as to the children of any child of Nancy born after the testator's death. See Gray Perp. (2d ed.), §§ 392-394.

8. *In re Hargreaves*, 43 Ch. Div. 401; *Johnson's Estate*, 185 Pa. St. 179; *Hartson v. Elden*, 50 N. J. Eq. 522; Gray Perp. id. § 475.

9. *Collins v. Foley*, 63 Md. 158; *Lawrence's Est.*, 136 Pa. St. 354; Gray Perp. id. § 475.

10. Gray Perp. id. §§ 476, 476a.

A power which must be exercised within a reasonable time, such as a power to sell in order to pay debts or legacies, and twenty-one years is more than a reasonable time, is valid, since it must be exercised, if at all, within twenty-one years. Gray Perp. id. §§ 478, 486.

A general power of sale, unlimited as to time, given to trustees, is valid, because in any case the *cestui que trust* has the powers to have the land conveyed to him in fee at any time, terminating the power. He is substantially the owner in fee. If there are prior equitable life estates they will end within lives in being, and prior equitable estates tail may be barred wherever they are permitted, and the property is in no case tied up by the power for more than lives in being, if at all. *Cole v. Sewell*, 4 Dr. & W. 1, 32; *Seamans v. Gibbs*, 132 Mass. 239; *Cooper's Estate*, 150 Pa. St. 576; *Hart v. Seymour*, 147 Ill. 598; *Pulitzer v. Livingston*, 89 Me. 359; Gray Perp. (2d ed.), §§ 478-492, 509k-509r. But where the power in

The mere fact that the power may be exercised in such way as to give rise to an interest which will violate the rule does not make the power void. Thus where a power is given to a life tenant to divide the property among his children by will on his death in such way as he may elect, the power is good though the life tenant may provide that some part of the property go to his children on the happening of a contingency which may not happen within twenty-one years after his death. The power is valid though the exercise of it may be to create an estate which will be void as violating the rule.¹¹ In every such case the validity of the interest resulting from the power will depend on whether or not it must vest within lives in being and twenty-one years from the time the instrument creating the power took effect, not from the time the power was exercised.¹² But where the power of disposing of the property to any one by deed or will is given, so that the person to exercise the power may appoint himself or anyone else as he may elect, he is as a practical matter owner of the property, and the rule against perpetuities does not apply.¹³

such case is made independent of the *cestui que trust*, and is intended to continue for a time not limited to a reasonable time, less than twenty-one years after the *cestui* acquires the fee, or to lives in being and twenty-one years after its creation, it is void as violating the rule. Such a situation is exceedingly improbable, and the intent to create such a power must be very clearly expressed. *Id.* § 493.

11. *Wilkinson v. Duncan*, 30 Beav. 111; *Lawrence's Estate*, 136 Pa. St. 354, 364; *Hillen v. Iselin*, 144 N. Y. 365, 380; *Lewis Perp.*, 487, 488; *Gray Perp.* (2d ed.), §§ 510, 512.

12. See last preceding note. As stated by Prof. Gray, "No appoint-

ment made under a power is good, unless at the time of the creation of the power it was certain that if the appointment was ever made the appointee's interest would vest, if at all, within twenty-one years after lives then in being." *Gray Perp.* (2d ed.), § 515.

13. *Gray Perp.* (2d ed.), § 524. In such case the exercise of the power is in effect a disposition of the property of the person so exercising the power, and a future interest so created by him is valid if it must vest within lives in being and twenty-one years from that time, not from the time the power was created. *Miffin's Appeal*, 121 Pa. St. 205.

In New York, Michigan, Minnesota

§ 265. **Charitable Trusts.**—A charitable trust involves, as we have seen,¹ a trust for some charitable or benevolent object, the beneficiaries being the general public or some indeterminate part thereof. There are no definite and ascertained beneficiaries. A present charitable trust in no way violates the rule against perpetuities which is concerned only with future contingent interests. There are no definite beneficiaries of a charity, and therefore the beneficial interest cannot be alienated. That they necessarily suspend the power of alienation arises, therefore, from their inherent nature.

But a charitable trust cannot be created to arise at a time in the future which will be too remote under the rule. In other words the present estate in a private person in fee cannot be tied up by the creating of a future contingent charitable trust to take effect at a time which is too remote under the rule.² But where a present charitable trust in fee is followed by another charitable trust in fee to take effect on the happening of some contingent event in the future, it is immaterial whether such event must happen within lives in being and twenty-one years or not. In other words the rule against perpetuities does not apply to a

and Wisconsin statutes provide that the period of suspension of alienation must be computed from the time of the creation of the power, not from the time of the exercise of the power. N. Y. Real Prop. L., § 178. Section 179 of the same act provides that "An estate or interest cannot be given or limited to any person, by an instrument in execution of a power, unless it would have been valid, if given or limited at the time of the creation of the power." This clearly changes the common law rule as to the validity of an estate so created by exercise of a general power. *Fargo v. Squiers*, 154 N. Y. 250; *Dana v. Murray*, 122 N. Y.

604; 1 *Stimp. Am. St. L.* § 1658.

1. See § 198, *ante*.

2. *Johnson's Trusts*, L. R. 2 Eq. 716; *Leonard v. Burr*, 18 N. Y. 96, 107; *Smith v. Townsend*, 32 Pa. St. 434.

Where a gift to an individual is made to take effect after the expiration of a charitable trust it goes without saying that the gift over is subject to the rule. *Church in Brattle Sq. v. Grant*, 3 Gray (Mass.) 142; *Theolog. Educ. Soc. v. A. G.*, 135 Mass. 285; *Merritt v. Bucknam*, 77 Me. 253. On the subject of Charitable Trusts under the rule, see *Gray Perp.* (2d ed.), Ch. XVIII.

charitable trust limited to take effect on the termination of a present charitable trust, whether a change of trustees is provided for or not. Therefore if a trust is created in city A for a stated charitable purpose, and on the happening of some contingency not illegal or impossible the property is to go to city B for another charitable purpose, the second limitation is valid though it depends on a contingency which may not happen within the limits fixed by the rule.³ The reason is that the purpose of the rule is a practical one—to prevent the tying up of property and the taking it out of commerce for too long a time by the creating of future contingent interests. But where a present charitable trust is created the property is effectually taken out of commerce in a valid way. The provision that on the happening of a contingency the first charity shall cease and another arise will in no way change the situation as to alienability. The property will continue to be inalienable as it would have been had the first trust been absolute. There is no reason, therefore, for declaring the second trust void merely because it may not vest within the required limits; because alienation is suspended in any event by the first charity should the second trust be declared invalid.⁴

Where a gift for a charitable purpose is made to a corporation to be formed, it is good because if the corporation should not be formed within a reasonable time, under the *cy pres* doctrine the court will carry out the general charitable purpose of the testator and give effect to the charitable trust in some other way. Therefore the gift does not violate the rule, since it does not necessarily depend on the incorporation as a condition precedent, but is a present vested interest.⁵

3. *Christ's Hosp. v. Grainges*, 16 Sim. 83; *Storrs Agr. School v. Whitney*, 54 Conn. 342; *Lennig's Est.*, 154 Pa. St. 209; *Odell v. Odell*, 10 Allen (Mass.) 1; *Gray Perp.* (2d ed.), §§ 597-599.

4. See *Gray, Perp.*, §§ 600-603h.

5. *Inglis v. Sailor's Snug Harbor*, 3 Pet. 99; *Sherman v. Cong. Missionary Soc.*, 176 Mass. 349; *Andrews v. Andrews*, 110 Ill. 223; *Crerar v. Williams*, 145 Ill. 625; *Harrington v. Pier*, 105

Where the charitable gift depends on any other condition precedent, the charity being a future executory gift not preceded by a gift to a private person or corporation, it is subject to the rule, and the contingency must be one which will certainly happen within the required period, exactly as in the case of a charity following a prior gift to an individual.⁶

§ 266. Accumulations.—A direction for the accumulating of income and the payment of the income so accumulated to a person on the happening of some contingent event is void at common law if the right to the enjoyment of the income depends on such event as a condition precedent and the event may not happen within the limits fixed by the rule against perpetuities.¹ But if the right to principal and

Wis. 485, 510; *Missouri Hist. Soc. v. Academy of Science*, 94 Mo. 459; *Wentworth v. Fernald*, 92 Me. 282; *Stevens' Est.*, 164 Pa. St. 209; *Estate of Merchant*, 143 Cal. 537. See *Gray Perp.* (2d ed.), §§ 607-609, and long list of cases there cited.

In New York the common law rule as stated in the text has been restored by subsequent legislation. *Allen v. Stevens*, 161 N. Y. 122; Ch. 701, N. Y. Laws of 1893, now § 113 of the Real Prop. Law. The former rule in New York that a charitable gift to a corporation not in existence was void prevails in Michigan and Minnesota as to real property only. *State v. Holmes*, 115 Mich. 356. See *Hopkins v. Crossley*, 132 Mich. 612; *Little v. Willford*, 31 Minn. 173; *Atwater v. Russell*, 49 Minn. 22. In Minnesota, gifts to churches and religious societies are excepted by statute and are valid, though made to a corporation to be formed (*Minn. Gen. Statutes*, 1894, § 3048). In Wisconsin the New

York Revised Statutes have been followed, but this question has not been decided. *Harrington v. Pier*, 105 Wis. 485, 494. For a discussion of modifications of the general rule as stated in the text in these and other states, see *Gray Perp.* (2d ed.), §§ 609-627.

6. *Chamberlayne v. Brockett*, L. R. 8 Ch. 206; *Brooks v. Belfast*, 90 Me. 318, 324; *State v. Holmes*, 115 Mich. 456; *Jocelyn v. Nott*, 44 Conn. 55; *Gray Perp.* (2d ed.), 605, 606a.

As to charitable gifts after prior limitations to individuals, see note 2 under this section.

1. *Gray Perp.* (2d ed.), § 671. The gift of the accumulated income is void and the trust created for that purpose is also void, the property going to those who would otherwise be entitled, had there been no such provision. *Gerber's Est.*, 196 Pa. St. 366; *Thorndike v. Loring*, 15 Gray (Mass.) 391; *Andrews v. Lincoln*, 95 Me. 541. See *Gray Perp.* (2d ed.), § 674, and cases cited.

income is vested in the person to whom the accumulated income is to be paid, the provision for accumulation being merely an attempt to render the property and its income inalienable until the happening of a future event, or until a future date, the direction for accumulation is void as an illegal restraint upon alienation, and can be put an end to by such person at any time, he being entitled to the property absolutely, and therefore the rule against perpetuities is not involved.² If the direction for accumulation violates the rule because dependent on a condition precedent which may not happen within the limits of the rule, it is bad altogether.³

By the Thellusson Act (39 and 40 Geo. III, c. 98), accumulations are allowed for any one of four different periods.

1. For the life or lives of the grantor or grantors, settler or settlers of the accumulation. 2. For the term of twenty-one years from the death of the grantor, settler, devisor or testator. If the accumulation is to start later it will end twenty-one years after the death of the person creating it. If it is to start, for instance, ten years after his death, it will run for only eleven years.⁴ 3. During the minority or minorities of any person or persons living or *en ventre sa mere* at the death of the grantor, devisor or testator. 4. During the minority or minorities of persons who, under the uses or trusts of the deed or will directing the accumula-

2. Rogers' Est., 179 Pa. St. 602; Kimball v. Crocker, 53 Me. 263. If the interest is to vest in the beneficiary at some future time, on his birth, or on the happening of some event which must happen, if at all, within the period fixed by the rule, the direction to accumulate thereafter is void as an illegal restraint on alienation, and may be terminated by the beneficiary at will, so that the property is no longer tied up. Phipps v.

Kelynge, 2 V. & B. 567, note; Otis v. Coffin, 7 Gray (Mass.) 511.

In these as in other cases of future estates the courts lean as a matter of construction in doubtful cases toward construing them as vested interests to which the rule does not apply, rather than contingent interests dependent on a condition precedent. Gray Perp. (2d ed.), § 673, and cases cited.

3. See cases in note 1, *supra*.

4. See Gray Perp. (2d ed.), § 697.

tion, would for the time being, if of full age, be entitled to the rents and profits or income so directed to be accumulated. If the accumulation is to start at the testator's death for the benefit of a person not then born, it can continue for twenty-one years only, not until the beneficiary subsequently born attains the age of twenty-one. But if it is to start on the birth of that person it may continue during his minority.⁵ Under this act a provision in violation of the statute is void only as to the excess. It will be good for twenty-one years in any event, provided it does not violate the rule against perpetuities. If it violates the rule it is void altogether.⁶ In Pennsylvania a statute similar in most respects to the Thellusson Act has been enacted.⁷ In most of the states accumulations are governed by the rule against perpetuities, being valid if they do not violate the rule.⁸

In New York, followed by Michigan, Wisconsin and Minnesota, the matter of accumulations is covered by statutes forming part of the elaborate system of statutes in those states relating to future estates and perpetuities. All accumulations are forbidden and made void except those expressly permitted. Accumulations are permitted for the benefit of minors during minority. The accumulation must end as to each minor upon his attaining the age of twenty-one, and the accumulated incomes must then be paid to him.⁹ An accumulation directed to be continued for too long a period is void only as to the excess, being valid during the minority of each beneficiary.¹⁰ Where the accumu-

5. Gray Perp. (2d ed.), § 699.

6. Gray Perp. (2d ed.), §§ 687, 688.

7. St. of Apr. 18, 1853, § 9. For a discussion of this statute and a review of Pennsylvania cases thereunder, see Gray Perp. (2d ed.), §§ 715-725. See Ala. Rev. Code of 1897, § 1031, limiting accumulation to ten years, or during the minority of min-

ors in being at the death of the testator.

8. See cases cited in notes 1 and 2, *supra*.

9. N. Y. Real Prop. L., § 61; 1 Stim. Am. St. Law, § 1443. See note 12, *post*.

10. The statutes so expressly provide. See preceding note.

lation is to start in the future, as on the birth of the beneficiaries, it must appear that it will certainly start within two lives.¹¹ A direction that the accumulated income be added to the principal of the trust fund, and the income therefrom be paid to the beneficiary thereafter is void. The entire sum so accumulated must be paid to the beneficiary or at least his share thereof, upon his attaining the age of twenty-one.¹² In other words the accumulation must be solely for the benefit of the minors involved, not for any other purpose.¹³

Thus a trust to accumulate until A is forty, and upon his attaining that age to pay him the accumulated income and principal will be enforced by paying him the accumulated income when he attains twenty-one; thereafter until he attains the age of forty he must be paid the income each year, and upon attaining the age of forty he takes the principal. *Pray v. Hegeman*, 92 N. Y. 508; *Radley v. Kuhn*, 97 N. Y. 26; *Cochrane v. Schell*, 140 N. Y. 516, 536; *Hascall v. King*, 162 N. Y. 134.

11. The statutes so provide. See note 9, *supra*.

12. *Pray v. Hegeman*, 92 N. Y. 508; *Barbour v. De Forest*, 95 N. Y. 13; *Wilson v. Odell*, 58 Mich. 533.

13. *Hascall v. King*, 162 N. Y. 134; *Hafner v. Hafner*, 62 App. Div. (N. Y.) 316, *aff'd* 171 N. Y. 633.

See *Smith v. Parsons*, 146 N. Y. 116, holding that a gift of the accumulation to another in case the minor die before attaining his majority is good.

CHAPTER XVI.

STATUTORY CHANGES IN RULE AGAINST PERPETUITIES.

§ 267. **General Nature of Changes.**—In New York an elaborate statutory scheme as a substitute for the common law rule was evolved as part of the Revised Statutes, taking effect January 1, 1830. This scheme has been followed in whole or in part in several of the more important states, and must therefore be carefully considered in any general treatise on the subject of real property. The modifications of this scheme in other states will be noted in the discussion of the New York statutes.

These statutes assume as a basis that the rule against perpetuities has for its main object the limiting of future interests which will suspend the absolute power of alienation, making void only those future estates which may suspend the absolute power of alienation of the property involved for too long a time. That this is a mistaken conception of the real purpose and scope of the rule as it has been developed at common law seems clear, as executory legal interests which could be released and equitable interests which could be released or assigned, and which therefore did not suspend the absolute power of alienation, were repeatedly held to be subject to the rule.¹ As provided by these statutes the absolute power of alienation is suspended when an absolute fee in possession cannot be transferred. If everybody having any interest, present or future, vested or contingent, executed or executory, join in a conveyance or transfer of the property in question to X, as representing any grantee, there is a suspension of the absolute power of alienation if X does not take an absolute estate in fee in possession. If he takes such an estate there is no such suspension and

1. See §§ 259-261, *ante*.

the future interests involved are not void as causing an undue suspension of this kind.

The statutes provide that "every future estate shall be void in its creation which shall suspend the absolute power of alienation by any limitation or condition whatever for a longer period than during the continuance of not more than two lives in being at the creation of the estate; except that a contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the person to whom the first remainder is limited die under the age of twenty-one years, or on any other contingency by which the estate of such persons may be determined before they attain full age. For the purposes of this section a minority is deemed a part of a life, and not an absolute term equal to the possible duration of such minority."²

The common law rule is therefore changed, first, by substituting suspension of the absolute power of alienation through future estates for remoteness of vesting; second, by substituting arbitrarily two lives in being for any number of lives in being, as the measure, in part, of the period of suspension allowed; third, by eliminating the provision that the suspension may continue for a flat term of twenty-one years, or for the minority of any person who may happen to be involved, and substituting therefor a possible further suspension, in addition to a period measured by two lives in being, of the actual minority of a remainderman in fee whose interest is subject to be defeated by his death or some other contingency occurring before he attains the age of twenty-one, on the happening of which contingency the estate is to go over to another. A limitation of this

² N. Y. Real Prop. Law, § 42. 2038-2045, 2047, 2048, 2060-2064. Michigan, Wisconsin and Minnesota (In Wisconsin suspension is allowed have adopted the New York scheme for two lives in being and twenty-one in almost every detail. 3 Mich. Comp. years, § 2039); Minn. Gen. Sta. Laws (1897), §§ 8796-8803, 8805, (1894), §§ 4375-4382, 4384, 4385, 8818-8822; 1 Wis. Sta. (1898); §§ 4397-4401.

kind, involving a suspension for more than two lives, is of rare occurrence. A conveyance or devise to A for life, remainder to B for life, remainder to C in fee, but if C should die before attaining the age of twenty-one (or on any other contingency which must happen before he attains twenty-one), then to such person as may be at that time mayor of New York, is an illustration. The absolute power of alienation is suspended because the future contingent interest in the person who may be mayor of New York after the death of A and B and the termination of C's minority cannot be conveyed during all this time, because it is impossible to say who will be mayor at that time, and there is no one who can convey his interest. Upon C's attaining twenty-one he will have an absolute estate, or upon his death before that time the then mayor would take an absolute estate, and the suspension would be at an end.³

The first question to determine in any case arising under these statutes is whether or not the absolute power of alienation is suspended. Such suspension can exist in only four

3. 2 Reeves Real Prop. 1269; *Manice v. Manice*, 43 N. Y. 303; *Toms v. Williams*, 41 Mich. 552.

The purpose of the revisers in making this provision was to permit the limiting of a future estate to unborn persons, as to the children of a prior life tenant, subject to the condition that they attain twenty-one years, or subject to some other contingency which must happen, if at all, before they attain twenty-one. Any suspension to continue after the death of the parent of such children would be void except for this provision, since the children in question might be born after the death of the testator. A good illustration of the application of this provision is *Adams v. Beyer*, 27 Abb. N. C. 429. Here a gift

by will was made to the daughter for life, remainder in fee to her children surviving her, provided they should attain the age of twenty-one, with a gift over to the grandchildren of the testator, then living in case no child of the daughter should attain twenty-one. Here there was a possible suspension during the life of the daughter and during the minority of a child or children of the daughter, who might be born after the death of the testator, the suspension during their minority being due to the contingent executory interests limited over by way of conditional limitation to the grandchildren who might then be in existence, their identity being uncertain.

classes of cases which will be taken up and considered separately. These four classes are: 1, suspension caused by contingent remainders; 2, suspension caused by future executory interests; 3, suspension caused by powers; 4, suspension caused by trusts.

§ 268. Suspension Caused By Contingent Remainders.—

Such suspension may be caused by contingent remainders limited to unborn persons or persons whose identity remains so unascertained that they cannot convey or release their interests. Thus where property is devised to A for life, remainder to B for life, or to A and B until the death of the survivor, remainder to the first mayor of Gloversville upon its incorporation as a city, the remainder is void, since Gloversville may not be incorporated during the lives of A and B, and the person who will be its first mayor may not be ascertained within two lives, and in the meantime the contingent remainder in such mayor could not be conveyed. Where a gift is made to A, B and C for their lives, either as joint tenants or as tenants in common with cross remainders between them until the death of the survivor, remainder in fee to the children of the survivor living at his death, the remainder to such children is void because contingent upon their birth, and an absolute fee cannot be conveyed until the death of the survivor of the three life tenants or after three lives. A child born to the third life tenant shortly before his death may be the one who will be entitled to take the remainder, in whole or in part, and therefore the absolute power of alienation would be suspended until the death of such third surviving life tenant.⁴

4. *Sawyer v. Cubby*, 146 N. Y. 192, 198; *Knox v. Jones*, 47 N. Y. 389; *Dana v. Muray*, 122 N. Y. 604.

A contingent remainder to unascertained persons limited to take effect at a fixed date in the future or

after the lapsing of any fixed time, such as twenty years, not measured by lives in either case, is void as suspending the absolute power of alienation for a fixed period not measured by one or two lives. Thus in *Haynes*

It seems to be settled under the cases that where three successive life estates are given to A, B and C, a remainder to the children of C is bad for the same reason.⁵ But it is submitted that this question requires a re-examination. Here the children of C must all be born during C's life, and on C's death all the persons entitled to take the remainder will have been ascertained, and their interests can be transferred, so that an absolute estate in possession can be conveyed. If A and B are still alive when C dies, A and B and the children of C may convey an absolute estate in fee in possession. If A and B are then dead, the children of C have the entire fee and, of course, can convey it. In any event the period of suspension is measured solely by the life of C, the lives of A and B having nothing to do with it. The statute does not require that the remainder must vest in possession, or even in interest, within two lives in being. It simply requires that the remainder become alienable by the ascertainment of the remaindermen within two lives. In the above case the remainders became alienable on the death of C, within one life, whether or not the

v. *Sherman*, 117 N. Y. 433, a remainder to the testator's then living heirs after a trust to continue until his youngest child should attain the age of twenty-one, or would have attained that age if living, was void since limited to persons whose identity would not be determined until a fixed date in the future, viz.: the date when the youngest child would attain the age of twenty-one, or would have attained that age if living, the period of suspension in no way measured by the life of the child. So a gift to grandchildren living at a date in the future fixed for final distribution, not measured by lives, would be void for the same reason. *Smith v. Edwards*, 88 N. Y. 92.

A gift to grandchildren after precedent life estates causes no suspension if there are grandchildren living at the testator's death, since the remainder vests in them at once, and they may join with the life tenants in conveying the property in fee. Subsequently born grandchildren will be admitted to an equal share, and as every such grandchild must be born within the life of its parent, its share will be alienable within one life, and is therefore good. *Wilbur v. Wilbur*, 165 N. Y. 451; *Haug v. Schumacher*, 166 N. Y. 506; *Smith v. Edwards*, 88 N. Y. 92.

5. *Purdy v. Hayt*, 92 N. Y. 446; *Knox v. Jones*, 47 N. Y. 389. See, also, cases in note preceding.

precedent life estates of A and B had come to an end, the lives of A and B having nothing to do with the suspension.

The same result follows where, in the case last referred to, the remainder is given to the surviving children of C, or to the children of C provided they attain twenty-one, or on any other condition precedent. The remaindermen are ascertained when C dies, and they may then convey their interests, no matter how many contingencies may have been added to the limitation. Contingent remainders are as freely alienable as vested interests in New York and most, if not all, the other states, certainly in all in which statutes modifying the common law rule against perpetuities have been enacted. They no longer suspend the absolute power of alienation after the identity of the remaindermen has been ascertained.⁶

The common law rule as to remoteness of vesting has been partly retained in New York in the case of a contingent remainder limited after a term of years. The statute provides that a contingent remainder may be limited after a term of years on a contingency which if it should occur must happen within two lives in being. This unquestionably applies to all contingent remainders whether to ascertained or unascertained persons, irrespective of whether the absolute power of alienation is suspended or not. It has been contended that this statute was intended to apply only to contingent remainders which suspend the power of alienation because limited to a person or persons not ascertained. But such a construction would make the statute of no effect whatever, except to eliminate the provision of § 42 of the Real Property Law as to suspension for a possible minority after two lives in being, since under § 42 such a re-

6. *Sawyer v. Cubby*, 146 N. Y. 192; *Smith v. Edwards*, 88 N. Y. 92. See last two preceding notes. *tate vests in them at once, possession only being postponed. Bradley v. Kuhn*, 97 N. Y. 26; *Van Brunt v. Van Brunt*, 111 N. Y. 178.

In the case of a gift to children when they attain twenty-one, the es-

mainder would be void if it might suspend the power of alienation for more than two lives. The statute means what it says, viz.: that all contingent remainders after a term of years must vest if at all within two lives, and the Court of Appeals has so held, in a case involving exactly the same principle in the construction of a like provision that a fee upon a fee must vest, if at all within two lives, contained in § 50 of the Real Property Law.⁷

7. N. Y. Real Prop. Law, § 46; *Butler v. Butler*, 3 Barb. Ch. 304; *Matter of Wilcox*, 194 N. Y. 288. In this case the testator gave one-third of the residue in trust for his daughter for life, remainder in equal shares to her children, each child to take its portion on attaining the age of twenty-one, in the meantime each child to receive its share of the income. In case no child of the daughter should attain the age of twenty-one the share of the daughter was given to two other children of the testator. The court held that the trust in favor of the children of the daughter until each should attain the age of twenty-one was void, since the trust might suspend the absolute power of alienation during the minority of children born to the daughter after his death. As the daughter died without issue surviving her, her only child having died long before the testator's death, no question existed as to the validity of the gift by way of remainder to her children. The gift over to the other two children of the testator in case the daughter died without issue who would attain twenty-one was held to be void, being a fee limited after a fee created in the issue of the daughter, depending on a contingency which might not happen within two lives. If there had been

such children surviving the daughter they would have taken a fee subject to be defeated in case of their death before attaining twenty-one, on the happening of which event the estate would go over to the other two children of the testator. But as the children of the daughter might be, and in this case would necessarily be, born after the testator's death if ever, the contingency might not happen within two lives in being at his death, the only measure of the period in which the gift over would take effect being the flat term of twenty-one years. The court, following the express provision of § 50 of the Real Property Law, that, a fee upon a fee must be limited in a contingency which must happen, if at all, within two lives, held that the gift over was void, though it did not suspend the absolute power of alienation at all, the other two children of the testator to whom the gift over was made being alive and able to convey their interest at any time. The court makes clear that the revisers intended to provide against remoteness of vesting in certain cases as well as against suspension of the power of alienation; that if a fee upon a fee was to be held invalid only in cases where it suspended the absolute power of alienation there would be no reason or purpose in pro-

§ 269. Suspension Caused by Future Executory Interests.

—Future executory interests will suspend the absolute power of alienation when limited to unascertained persons, as in the case of contingent remainders. These interests may now be conveyed as freely as estates in possession in most of the states—certainly in New York and the other states which have modified the common law rule against perpetuities by statute. As heretofore pointed out, there is no longer any real distinction between these interests and remainders, and in the New York statutes and the statutes of other states they are called remainders and made subject to the same rules.⁸

The New York statute has retained the principle of the common law rule in the case of a fee upon a fee, known as a conditional limitation. The contingency on which the second fee is to take effect must be one which will necessarily

viding that it must be limited on a contingency which must happen, if at all, within two lives, as provided by § 50 of the statute, § 42 covering the case completely if suspension of the absolute power of alienation was alone forbidden.

It follows, of course, that under § 46 of the same statute a contingent remainder limited after a term of years is void unless it will necessarily vest within two lives, that section so expressly providing, exactly the same principle applying as was applied in the Wilcox case to a fee upon a fee under § 50.

The court in the Wilcox case by way of dicta lays down the broad general proposition that all future contingent interests must vest within two lives and the possible minority provided for by § 42 of the statute. This position cannot possibly be sustained. The revisers provided against

remoteness of vesting only in the two cases above referred to, a fee upon a fee and a contingent remainder limited after a term of years. There is no suggestion of any other provision against remoteness of vesting anywhere in the statutes. The suppositious case of a trust for 1000 years referred to by the court (p. 305), is one of a great many cases which the New York statutory rule does not forbid, but which are obviously contrary to public policy. It is very clear that the statute has left the entire question of perpetuities in a state of confusion which has been only enhanced by attempts to interpret it. A restoration of the common law rule as to all estates created thereafter is the best way out of the difficulty. See § 269, note 11, *post*.

8. See § 251, *ante*; *Matter of Wilcox*, 194 N. Y. 288.

happen within a period measured by two lives in being at the creation of the estate. Here as in the case of a contingent remainder limited after a term of years, it has been argued that only such interests are intended to be included as suspend the absolute power of alienation because limited to a person or persons not in being or not ascertained.⁹ But the only possible construction is that given it by the Court of Appeals, viz.: that every fee upon a fee must vest if at all within the period fixed by the statute, whether it suspends the absolute power of alienation or not. The language of the statute contains no such qualification, and the provision would be absurd and meaningless if it should be so limited, as § 42 of the Real Property Law, limiting suspension of the absolute power of alienation to the statutory period, would fully cover the case if the construction so contended for should be adopted, making this provision entirely unnecessary.¹⁰

It seems clear that the revisers themselves must have realized that the limiting of the suspension of the absolute power of alienation did not cover the situation, and they attempted to piece out their work by providing against remoteness of vesting in two of the more glaring cases which occurred to them. But there are the same reasons exactly for providing against too remote vesting of all other contingent remainders and future executory interests to spring up in the future on the happening of a remote contingency. As the law stands a contingent remainder to a person in existence and his heirs upon the incorporation of Gloversville, or upon the happening of any other condition precedent which may not happen for hundreds of years, limited after a life estate, is valid, and on the happening of the event hundreds of years later the heirs or assigns of the remainderman will be entitled to the property, since the termina-

9. See Fowler's Real Prop. Law (3d ed.), pp. 333, 343, 344. by Matter of Wilcox, 194 N. Y. 288. For a discussion of this case, see note

10. The question has been settled 7, *supra*.

tion of the prior life estate or estates does not affect the contingent remainder.¹¹ So a future executory interest to spring up in an ascertained person in fee on a similar remote contingency is valid, except in the one case of a fee upon a fee. It would be a very wise thing to restore the common law rule in its entirety, retaining, however, the provisions of the statutes which make all future estates, whether remainders or executory interests, subject to the same rules, by doing away with all distinction between executory interests and remainders.

§ 270. Suspension Caused By Powers.—Powers which may be exercised in favor of unascertained persons suspend the absolute power of alienation in every case of a power in trust, since the property must be conveyed subject to the power until the persons in whose favor it is to be exercised have been born or otherwise ascertained. Therefore a power in favor of persons who may not be ascertained within the period fixed by the statute is void. Thus

11. As stated in note 7, *supra*, the dicta in the Wilcox case, that *all* future estates must vest within two lives and a possible minority has nothing to support it in the statutes. Restrictions upon remoteness of vesting were provided for only in the two cases of a contingent remainder after a term of years and a fee upon a fee. To so change the law by decision would be judicial legislation, and unfair as affecting existing estates or limitations. To so change the law by statute would be highly desirable, affecting only interests thereafter created.

The other changes effected by the revisors of two lives in being and a possible minority instead of lives in being and twenty-one years as the period of suspension allowed, has

worked a great deal of mischief. Most of the litigation which has since arisen in hundreds of cases in New York, under the rule has turned on the application of this provision. The period of two lives is arbitrary, does not apply naturally to the different situations that arise, and is difficult to apply in many cases. The rule making lives in being the measure applies automatically to each case, permitting devisors to provide for their children or other relatives, whatever their number in a rational way without purely technical provisions to avoid suspension for more than two lives. The period of suspension will be actually about the same in either case, the life time of some person in being.

a power of appointment in favor of the child or children of an unborn person is void, since such children may not be born within two lives in being at the time the power was created.¹ The mere fact that the power may be exercised at too remote a time does not render it void,² since the absolute power of alienation is suspended only by powers in favor of unascertained persons. If the persons or class in whose favor the power must be exercised are ascertained, or must be ascertained within the period fixed by the statute, it is valid, though it may not be actually exercised until a more remote time, since it may be released and an absolute estate conveyed.³ A general power which is not imperative, and which may or may not be exercised by the donee does not cause any suspension, as an absolute estate free of the power may be conveyed at any time, the donee joining with the others interested in the property.⁴

1. *Hawley v. James*, 16 Wend. (N. Y.) 61, 175. See cases in notes following.

The mere fact that the power is directed to be executed after a fixed period not measured by lives or on the happening of an event which may be too remote does not render the power void provided the beneficiary is ascertained and may convey or release his interest, because in such case an absolute fee may be conveyed and no suspension exists. Thus in *Garvey v. McDevitt*, 72 N. Y. 556, the executors were directed to sell the land and pay the proceeds to the Bishop of R., after a term of years. The power was void since during the term of years in question the Bishop of R. could not convey or release his interest since he was to take subject to a charitable trust. A similar power in favor of an individual in his own right would be valid, since his inter-

est under the power could be released and an absolute fee conveyed at any time.

2. For common law rule, see § 264, *ante*.

3. *Hawley v. James*, 16 Wend. 61, 140, 175; *Hone's Ex'rs v. Van Schaick*, 20 Wend. 564, 566, 567; *Garvey v. McDevitt*, 72 N. Y. 556; *Kilpatrick v. Barron*, 125 N. Y. 751. See preceding note.

4. *Root v. Stuyvesant*, 18 Wend. 257. In New York all powers in trust are imperative unless expressly made to depend on the will of the donee. N. Y. Real Prop. Law, § 157. Powers in trust which are not discretionary, and imperative powers ordered to be executed at some future time, are the only powers which may cause a suspension, and then only when the power cannot be released because the beneficiaries of the power are not ascertained, or because it is an impera-

An imperative power to sell, but not until five years after the testator's death (or any other fixed period not measured by two lives), is bad provided the beneficiaries are unas-
certained or for any other reason cannot release it, because the absolute power of alienation would be suspended for a flat period not measured by the lives of two persons in being.⁵

Though the power be validly created, any estate created by its exercise must not cause a possible suspension for longer than the period fixed by the statute. Therefore, under a general power of appointment which is not imperative and which causes no suspension as explained above, if the donee appoint a future interest in the child of a person not in being when the power was created, or to any person whose identity may not be ascertained within the statutory period measured from the taking effect of the deed or will creating the power, the estate so appointed is void.⁶ At common law a general power of appointment was regarded as making the donee practically the owner, so that any estate created by him was valid if it would vest within lives in being and twenty-one years from the time of the appointment.⁷ But in New York and a few other states statutes have been enacted, changing this rule without good reason, providing that the period during which the absolute power of alienation may be suspended by any instrument in execution of a power must be computed, not from the date of

tive direction to sell in the future which cannot be released by those who are to receive the proceeds. See cases in preceding note; also *Garvey v. McDevitt*, 72 N. Y. 556.

5. *Garvey v. McDevitt*, 72 N. Y. 556.

6. *Fargo v. Squiers*, 154 N. Y. 250; *Dana v. Murray*, 122 N. Y. 604.

It follows that a power is perfectly valid though it *may* be exercised in

such way that the resulting estate will violate the rule. The resulting estate will be valid or invalid depending on whether it may cause an undue suspension measured from the time of the taking effect of the original will by which the power was created. *Hillen v. Iselin*, 144 N. Y. 365; *Beardsley v. Hotchkiss*, 96 N. Y. 201.

7. See § 264, *ante*.

the instrument, but from the time of the creation of the power.⁸

§ 271. **Suspension Due to Trusts.**—Trusts ordinarily do not suspend the absolute power of alienation because the trustee and *cestui que trust* may join in a conveyance of the absolute fee in possession.¹ But in New York the third express trust provided for by § 96 of the Real Property Law, viz.: a trust to collect the rents and profits and apply them to the use of a beneficiary for life, or for a shorter term, suspends the absolute power of alienation since the beneficiary of this trust is expressly prohibited from conveying his interest by § 103 of the same statute. Similar statutes have been enacted in Michigan and Wisconsin.² The beneficiary's joining in a conveyance of the property, therefore, is ineffective, and an absolute fee in possession cannot be conveyed while the trust lasts. Such a trust may be created for two lives only. Thus a trust in favor of A for life, and then for B for life is valid. If additional trusts should be created for the benefit of C, D and E for their respective lives in remainder, they would be void as causing a suspension beyond two lives, though the first two trust estates for the lives of A and B would be valid, as they are separate and distinct from the void trusts, and do not in themselves violate the statute.³ A trust for the joint lives of A, B and C to continue until the death of the survivor is void, since it causes a suspension for three lives. No part of it can be saved, since the trust is as much for the benefit of one as of any other, and it is impossible to give any preference to any one of the three.⁴

8. N. Y. Real Prop. Law, §§ 178, 179. See § 264, *ante*. See, also, cases in note 6, *supra*.

1. See § 262d, *ante*.

2. Wis. Stat. (1898), § 2089; 3 Mich. Comp. Laws, 1897 (8847), § 19, p. 2715.

3. Woodruff v. Cooke, 47 Barb. 304; Schermerhorn v. Cotting, 131 N. Y. 48. See cases cited in notes 4 to 8, immediately following.

4. Fowler v. Ingersoll, 127 N. Y. 472; Central Trust Co. v. Egleston, 185 N. Y. 23; Sanford v. Goodell, 82

But a trust for the benefit of any number of persons for life as tenants in common, with no survivorship as between them, is good, since there are as many distinct and separate trusts as there are life tenants in common, each taking a separate and distinct undivided interest for life, each suspending the absolute power of alienation as to his interest for his life only.⁵ Thus a trust for the benefit of all the testator's children for life, the trust to end as to the share of each on his death, and the principal of his share to go to his heirs in fee, or to be otherwise disposed of absolutely, is good, since there are as many separate shares and trusts as there are children, each taking for one life only, the trust ending as to each share on the death of the child to whom it was given for life.⁶

A more difficult situation is presented where a devise is made in trust for the testator's children for life, with the provision that on the death of any child, or on the death of any child without issue, his share should be divided among the survivors to be held subject to the trusts to which their original shares were subject. Suppose there are four chil-

Hun 369; *Bindrim v. Ullrich*, 64 App. Div. 444; *Almstaedt v. Bendick*, 47 App. Div. 265.

5. *Wells v. Wells*, 88 N. Y. 323; *Tiers v. Tiers*, 98 N. Y. 568; *Van Brunt v. Van Brunt*, 111 N. Y. 178; *Vanderpoel v. Loew*, 112 N. Y. 167; *Hillyer v. Vandewater*, 121 N. Y. 681; *Corse v. Chapman*, 153 N. Y. 466; *Allen v. Allen*, 149 N. Y. 280; *Haug v. Schumacher*, 166 N. Y. 506; *Locke v. Farmers' Loan & Trust Co.*, 140 N. Y. 135. See cases in notes following.

6. Thus in *Van Brunt v. Van Brunt*, 111 N. Y. 178, the residuary estate was given in trust for the testator's eight children for life in equal shares, and after their deaths for their respective wives or husbands for life or until remarriage, remainder as to each

share to the children of the child in each case in fee. If any child should die without issue or a husband or wife surviving, that child's share was given absolutely to the other surviving children of the testator. This was good in all respects as eight trusts arose, one in favor of each child, which could continue only for the life of the child and for the life of the child's surviving husband or wife, then vesting absolutely in the children of the child, or in the surviving children of the testator. Exactly the same principle is illustrated in *Corse v. Chapman*, 153 N. Y. 466; *Vanderpoel v. Loew*, 112 N. Y. 167, and in the other cases in the preceding note; also in the cases cited in note 8 following.

dren, A, B, C and D. On the death of the first child, A, his share would be held in trust for the benefit of B, C and D in equal shares. On the death of B his original share would be held in the same way for the benefit of C and D. Up to this point there is no violation of the statute, since A's share would be divided into three equal and distinct undivided parts, and B, C and D would hold one part each as tenants in common. The suspension as to each undivided part would be for only one life, the second life in each case, beyond which the suspension could not go. In the same way the provision for the distribution of the original share of each of the others is valid, since it will cause a suspension, as to each subportion, for only two lives. But if the will is to be construed as meaning that the subportion of A's share which B received on A's death should be divided between C and D for their lives on B's death, the provision as to this second division of said subportion is void, since it would cause a suspension for a third life as to each of the subportions thereof, viz.: for the life of C as to one subportion, and for the life of D as to the other. Therefore any direction for a second division for life under the trust of the subportion resulting from the division of any one of the original shares, is void as violating the rule. But as these provisions for the further division of such subportions are entirely distinct and apart from the preceding valid divisions, the preceding direction for the division of the original shares for the lives of the survivors must be given effect, and only the direction for the further subdivision of subportions declared void.⁷

The courts do not seem to have clearly recognized this, and in order to give effect to the direction for subdivision of the original portions they have held that the will should be construed as meaning that the subportions should be "held subject to the same trust" as the original portions only during the life of each of the surviving children, that

7. See cases in last preceding note, and also in note following.

no further subdivision was contemplated, and on the death of B or any other child, the trust would cease as to his subportion, and in the absence of some express provision disposing of it absolutely, the testator would have died intestate as to the remainder in the subportion in question. Of course, if the will be given its natural construction, calling for a subdivision of the subportion in each case, the same result would be reached, because this provision would be void as in violation of the rule, and the testator would have died intestate to that extent.⁸

8. In *Schey v. Schey*, 194 N. Y. 368, testator directed that his residuary estate should be divided into five parts, one part to be held in trust for each of his five children until they should attain a certain age when they were to receive the principal. If any child should die leaving issue before attaining the age designated, his share should go to his issue absolutely. It was then separately provided as to each child that if he should die without issue before attaining the stated age, his share should be divided among the four survivors in each case to be held in trust "for the same uses and subject to the same conditions as I have in this instrument directed or will direct their share of my residuary estate to be held." The court held the will valid. Of course the separate trust in favor of each child was valid in any event. The direction for a trust in favor of the four survivors until they should attain the required age on the death of any child was also good, causing a further suspension as to each subportion for a second life. The court construed the will as meaning that no further division of a subportion on the death of any of the four surviv-

ing children was contemplated, the trust ending as to each subportion on the death of the child receiving it. The court indicates that even if a further division of the subportion was intended the interests created under the will up to that point would be good, the trust for a further division of subportions for the use of the remaining children alone being void as causing a suspension for more than two lives.

In *Chastain v. Dickinson*, 201 N. Y. 538, testatrix divided her residuary estate into five parts, giving one each to two of her children absolutely, and providing that one each should be held in trust for each of her other three children for life, and on the death of Richard or Alfred, two of said children, the share of the one so dying to become part of her residuary estate and to be divided equally among the surviving children in the same way as their original shares. In case of the death of Mary, the third child in the trust, the income to be paid to testator's great-grandson until he should reach twenty-five, when the principal should be paid to him; if he should die before attaining twenty-five without issue, his share should

This principle of separable trusts created for the benefit of several persons as tenants in common should obviously be held to apply to gifts of personal property as well as

again become part of the residuary estate to be divided among the others surviving in the same way as their original portions. The court held the trusts in favor of the three children to be valid for their lives, and the provision that on the death of any one, its share should be divided among the others subject to the same trust as the original portions was also valid, causing a suspension, as to each subportion, for only one additional life in each case. Following the Schey case, they held that the will contemplated no further division of subportions, and therefore the testator died intestate as to each of such subshares on the death of a second or third child. The same result would have been reached if the court had construed the will in accordance with the natural meaning of the language used, holding the trust to continue as to subportions upon the death of a surviving child, during the life of the third child, etc., the trust being void only to that extent, and the testator dying intestate as to each subportion on the death of the second and third child, the trust being perfectly good in any event, not only as to the original shares, but also as to the subportions of each share during the life of the survivors, being void only as to the further division of a subshare on the death of any one of the surviving children. As to the share given in trust for the daughter Mary for life, remainder for life in trust for the grandson, it was valid to that extent, but void as to

its further division among the other children, causing a suspension beyond two lives.

In *Knox v. Jones*, 47 N. Y. 389, a trust was created in favor of A for life, and then to B and C for life, with cross-remainders between B and C for their lives, finally to the children of C if any in fee, if not to Columbia College in fee. The court held the entire trust void because indivisible. This decision is clearly wrong, and is directly opposed to the cases cited and discussed in this note and the notes immediately preceding. The trust for A's life was good, being separate and distinct, the trust for B and C was also good, they taking as tenants in common, each an undivided share, making a suspension for a second life as to each share. (See *Purdy v. Hayt*, 92 N. Y. 446.) The cross-remainders for life between B and C were alone void, since each would cause a suspension for a third life. The final remainder to the children of C was valid, though the court held otherwise, because their interests would become alienable on their birth, which of necessity would be during the life of C, whether A and B had died prior to that time or not, C's life alone measuring the time in which these remainders would necessarily arise in the children of C.

In *Murray v. Murray*, 122 N. Y. 604, a similar error was made. Property was conveyed in trust for Mrs. Murray during her husband's life; if he survived her then to convey as she might appoint by will. On Mrs. Mur-

to realty, and no such distinction has been made in the cases heretofore cited, which established this principle.⁹ There are some cases, however, which seem to have lost sight of this principle where a trust of personal property in favor of several persons was involved, it being treated as indivisible and as causing a suspension of absolute ownership of personalty for more than two lives where more than two beneficiaries were involved.¹⁰ It is submitted that the sus-

ray's death she appointed the property to her husband and three daughters in equal shares until any two of the daughters should marry, with cross-remainders between them for life or until such marriage of two of her daughters, and one year thereafter the property was to be sold by the trustee and the proceeds divided among Mrs. Murray's children then living and her grandchildren, *per stirpes*. The court held the entire will void.

It is clear under the later cases, as well as earlier cases cited in the notes immediately preceding, that the husband and daughter took as tenants in common, four separate trusts arising, which caused a suspension as to each share for two lives, the trust during Mrs. Murray's life having caused a suspension for one life. The cross-remainders were void as in the preceding case. The contingent remainder was void since the absolute power of alienation would be suspended possibly until the death of all four, making a possible suspension of five lives, as the court correctly held.

9. *Schey v. Schey*, 194 N. Y. 368; *Clastain v. Dickinson*, 201 N. Y. 538. See, also, cases cited in note 7, *supra*.

10. In *Matter of Wilcox*, 194 N. Y. 288, one-third of the residue was

given to the testator's daughter for life, and on her death in trust for her children surviving her until each should attain the age of twenty-one, the principal to go to such children, each taking his share upon its attaining twenty-one. The court said, after stating the conclusion that the trust in favor of the issue of the daughter until they should attain twenty-one was void; "This conclusion was undoubtedly correct, though it would have been valid in the case of real estate if it could be assumed that the trust was severed as to the share of each issue. (*Manice v. Manice*, 43 N. Y. 303.)" This was unnecessary to the decision of the case as the daughter died without issue, and as subsequently appears in the opinion the validity or invalidity of this trust could in no way affect the bequest over which was the real contest involved in the case. On the principle of the many cases above cited the issue of the daughter would take as tenants in common, each taking a separate share, and causing a suspension for a second life at most. The trust would be void as to children of the daughter born after the testator's death, as the trust in favor of such child would continue for a life not in being.

pension of absolute ownership of personalty and of the absolute power of alienation of realty depend on the same principles and no distinction should be made between them, the same law applying, except that the suspension is limited to two lives in being in the case of personalty, while it may be extended for a possible minority in one class of cases only in the case of realty, as heretofore explained.¹¹

The modification of the rule in its application to charitable trusts have been referred to heretofore.¹² In New York the common law rules governing charitable trusts have been restored. Such a trust is therefore valid, and does not suspend the absolute power of alienation within the rule, when limited to a corporation not yet formed, since the charity will be carried out whether the corporation is formed or not, and therefore the creation of the corporation is not a condition precedent to the taking effect of

In *Underwood v. Curtis*, 127 N. Y. 523, a trust was created for the life of the widow and two daughters, the daughters as executrices being given the power to sell at any time up to ten years after the mother's death, the trust to end and the proceeds to be distributed as directed on such sale. The court held the trust for the benefit of the widow good, but the trust in favor of the daughters void since the power of sale might not be exercised until ten years after the widow's death, the trust continuing for that period not measured by any second life. But the power of sale in the daughters made the property freely alienable at any time, and the case can only be supported on the theory that there was a suspension of absolute ownership of personalty, though no suspension of the absolute power of alienation. What does suspension of absolute ownership mean? Certainly it does not mean the divid-

ing of ownership between a life tenant and remainderman, or making such ownership subject to a condition subsequent, or subject to a lien or charge or the like. If it does not, then its only meaning is that the absolute ownership is not in existing persons who can join in a conveyance of it; in other words, the absolute power of alienation is suspended. There is no distinction between realty and personalty in the application of the common law rule, and it is absurd to suppose that the revisers intended to introduce any distinction except in the period of suspension, the Personal Property Law providing for a suspension for two lives only, excluding the possible additional minority which is permitted by § 42 of the Real Property Law. The suggested distinction is entirely without basis, and the above case is unsound.

11. See § 267, *ante*.

12. See § 265, *ante*.

the charity.¹³ A charity which is limited to arise after a prior gift to an individual, or to spring up in the future without any precedent interest being created at all, must be such that it will take effect within the period fixed by the statute, the rule being the same as at common law except as to the period during which suspension is allowed. Though a present charity suspends the power of alienation, the law permits such suspension. It is only in the case of a charity which is to arise in the future at too remote a time that the rule applies. What was said in the discussion of the common law rule with reference to charities with relation to the rule applies here, subject to the modification as to the length of the period of suspension.¹⁴

§ 272. Principles of the Common Law Apply Except as Modified by Statute.—Except as modified by statute the principles of the common law rule as discussed in the preceding chapter apply to cases arising in New York and the other states which have followed New York in legislation on this subject. It must appear affirmatively at the time the deed or will takes effect that the suspension cannot by any possibility continue for longer than the statutory period, and any limitation which may by possibility cause a suspension beyond the period so provided for is void in its creation, though subsequent events make an undue suspension impossible. The possibility of undue suspension as the facts exist when the deed or will takes effect renders the future estate void, it being quite immaterial whether or not undue suspension actually takes place thereafter.¹

13. See § 265. *ante*.

14. See § 265, *ante*.

1. *Haynes v. Sherman*, 117 N. Y. 433; *Schlereth v. Schlereth*, 173 N. Y. 444; *Dana v. Murray*, 122 N. Y. 604; *Fargo v. Squires*, 154 N. Y. 250; *Matter of Wilcox*, 194 N. Y. 288.

Thus in *Haynes v. Sherman*, 117 N.

Y. 433, a trust in favor of the testator's widow and six children until the youngest child should attain the age of twenty-one, or would have attained that age if living, was void, though the youngest child might attain the age of twenty-one shortly after the testator's death. It was a trust to

The lives of two strangers, having no connection in any other way with the estates involved, may be taken arbitrarily as measuring the period of suspension, and a provision which would be otherwise void as causing an excessive suspension will be valid if it is expressly provided that the suspension shall cease on the death of any person, or on the death of the survivor of any two persons, actually in existence, whose lives are taken to arbitrarily measure the continuance of the trust or other future interest causing the suspension. Thus a trust may be created for the benefit of any number of persons for their lives, jointly, provided it must come to an end as to all on the death of the survivor of two persons named, they being living persons at the time the deed or will in question takes effect.²

As at common law so in New York and other states following the New York statutes, only the future interest which violates the rule is void; all preceding estates which cause no undue suspension are valid. The more prominent illustrations are the causes of successive trusts given in the preceding section.³ To defeat the testator's or grantor's

continue in any event until the date when the youngest child would attain that age, a flat period, not measured by the life of the child. If the trust had been created to continue only until the youngest child should attain twenty-one, omitting the clause "or would have attained that age if living," the courts construe it as ending on the death of the youngest child before attaining twenty-one, the period of suspension being measured by the life of that child, making the trust valid.

A limitation in trust for the wife of an unmarried son for life is void, since the son may marry a person not yet born at the testator's death. The possibility of undue suspension makes the gift void. *Schettler v. Smith*, 41

N. Y. 328; *Tiers v. Tiers*, 98 N. Y. 568.

2. *Crooke v. County of Kings*, 97 N. Y. 421; *Bailey v. Bailey*, 97 N. Y. 460; *Schermerhorn v. Cotting*, 131 N. Y. 48.

So in *Haynes v. Sherman*, 117 N. Y. 433, discussed in the note preceding, the trust would have been good, though for the benefit of seven persons, the widow and six children, had the duration of the trust depended on the life of the youngest child, a single life, so that it would have ended either on his death or upon his attaining the age of twenty-one. That such a trust is good, see *Becker v. Becker*, 13 App. Div. 342.

3. See § 271, notes 5 to 11, *supra*. A trust to continue for three joint

intent by declaring void precedent gifts, merely because future remote gifts generally of little practical importance because of their remoteness and uncertainty are invalid,

lives and until the death of the survivor is bad as to all, since a joint tenancy for three lives is created, it being impossible to separate any part so as to save it. *Central Trust Co. v. Egleston*, 185 N. Y. 23. But where three or more persons take for life as tenants in common with cross-remainders for life, each takes a separate and distinct share, which can and must be treated separately as a separate trust, suspending the absolute power of alienation for one life. The first cross-remainder in trust on the death of any one to the others is also good, causing a suspension in each case as to each subportion, for a second life. But on the death of a second of these cotenants, though the cross-remainder to the survivor or survivors of his original share would be good, the cross-remainder as to the share of the tenant first dying which had been received by him would be bad, since it would cause a suspension for a third life. This principle is clearly involved in *Purdy v. Hayt*, 92 N. Y. 446, the testator devising his real estate to his sisters, Jane and Catherine, during their respective lives, and on the death of the survivor the property was to be sold and the income paid to his niece, Elizabeth, during her life, remainder to her surviving children. Jane died before Catherine. The life estates in Jane and Catherine were, of course, valid, being present vested life estates at law, and the cross-remainders between them were valid also. The trust estate in remainder in Eliza-

beth was void as to Jane's share, that having first passed to Catherine for life, and the trust in favor of Elizabeth causing a suspension for a third life in being, since it could not start until the expiration of the lives of Jane and Catherine. But the trust for life in favor of Elizabeth was valid as to the share originally given Catherine since it caused a suspension for two lives only, those of Catherine and Elizabeth, and the remainder to Elizabeth's children was valid as to that share for the same reason. By tracing the succeeding possible remainders in this way declaring void only those which may cause an undue suspension, all confusion is avoided and the law easily applied. See, also, *Corse v. Chapman*, 153 N. Y. 466; *Schey v. Schey*, 194 N. Y. 368; *Chastain v. Dickinson*, 201 N. Y. 538, cited and discussed in the preceding section, notes 6 and 8, where the same principle is necessarily involved in sustaining gifts of subportions in the case of trusts in favor of several children, with the provision that on the death of any child its share should be held subject to the same trust in favor of the surviving children. Some of the earlier cases in which this principle has been lost sight of are discussed in note 8 under the section preceding, viz.: *Knox v. Jones*, 47 N. Y. 389, and *Murray v. Murray*, 122 N. Y. 604, it being very apparent in these and other earlier cases that the court had failed to grasp the principle involved.

would be mere wantonness of destruction. By analyzing each gift, tracing each successive estate, and condemning only those which actually violate the rule, its application becomes a relatively simple matter. Much confusion in the cases has resulted from a failure to do this.⁴

As at common law, so also in New York, personal property as well as realty is subject to the rule. The N. Y. Personal Property Law, § 11, forbids such suspension for any period in excess of two lives in being, so that the provision permitting a suspension for a possible minority in addition to two lives in the case of a fee upon a fee in limitations of realty, as explained heretofore,⁵ does not apply to personalty.⁶ Tenancies for years are made subject to the statutes applying to real property by the express provision of § 49 of the Real Property Law of New York. Section 11 of the Personal Property Law provides further that in all other respects limitations of future or contingent interests in personal property are subject to the rules prescribed in relation to future estates in real property. In Michigan, Wisconsin and Minnesota, though the New York scheme has been adopted as to real property, no statutory provision has

4. See preceding note.

5. See § 267, note 3, *ante*.

6. *Manice v. Manice*, 43 N. Y. 303. See *Matter of Wilcox*, 194 N. Y. 288, and *Underwood v. Curtis*, 127 N. Y. 523, as discussed in § 271, note 10, *ante*, these cases implying that the absolute ownership of personal property may be suspended though there be no suspension of the absolute power of alienation, a position that is believed to be untenable.

Section 15 of the Personal Property Law provides that the beneficiary of a trust to receive and apply income cannot transfer his interest. § 16 contains in general, the same provision as to accumulations that are pro-

vided for with respect to realty by the Real Property Law.

The New York rule will not be applied to render void a gift of personalty in a will made outside the state, or in a will made in the state if the property is given to legatees residing elsewhere, provided the gift would be valid where the will was made in the first case or where the property is to be sent, in the second case. The New York rule is concerned as to personalty only with domestic wills bequeathing personalty which is to remain in the state. *Cross v. United States Trust Co.*, 131 N. Y. 330; *Hope v. Brewer*, 136 N. Y. 126; *Dammert v. Osborn*, 140 N. Y. 30.

been made as to personalty.⁷ In Wisconsin it has been decided that the statutes have adopted the common law rule as to personalty, leaving no restriction upon the suspension of alienation or of vesting in gifts of personalty.⁸

§ 273. The More Important Statutory Changes in Other States.—In Iowa, Kentucky, California, North Dakota and South Dakota statutes forbid suspension of the absolute power of alienation for more than lives in being and twenty-one years. There seems to be no doubt that the period of gestation of a child *en ventre sa mere* would also be added in any case in which the question might arise.¹ The Indiana statute has a similar provision, omitting the provision as to a term of twenty-one years, and substituting therefor the relatively useless provision of the New York statute permitting a further suspension for the possible minority of a remainderman in fee, when the fee is limited over to another in case such remainderman die before attaining twenty-one.²

In Ohio estates to persons not in being are prohibited, except that estates “to the immediate issue or descendants of such as are in being at the time of making such deed or will” are permitted.³ In Connecticut the former statute modifying the common law rule has been repealed, and the common law rule is now the law in that state.⁴

7. *Toms v. Williams*, 41 Mich. 552, §§ 3629-3635, 3656-3662. See California and Dakota cases cited in Gray Perp. (2d ed.), § 751.

8. *Becker v. Chester*, 115 Wis. 90; 2. Ind. Rev. St. (1876), ch. 82, §§ Danforth v. Oshkosh, 119 Wis. 262; 40, 41. See Gray Perp. (2d ed.), §§ Gray Perp. (id.), § 751. 743-745, and notes.

1. Iowa Code, 1897, § 2901; Ky. 3. Rev. Sts. 1880, § 4200; Gray Sts. (1903), § 2360; Cal. Civ. Code, Perp. (2d ed.), § 740.

§§ 715, 716, 722-725, 770-777; N. 4. Conn. St. of 1895, ch. 249; Dak. Rev. Code (1895), §§ 3308- Healy v. Healy, 70 Conn. 467; Gray 3314, 3334-3341; S. Dak. Sts. (1901), Perp. (2d ed.), § 739.

CHAPTER XVII.

EASEMENTS AND PROFITS.

§ 274. **Nature and Characteristics.**—An easement is a right to make use of the land of another for some definite and limited purpose or purposes. A profit, or profit *a prendre* is the right of one person to take part of the soil of another or a part of its produce, an easement being any other right of enjoyment or user not involving the taking of a profit. If the user or profit is for the more convenient enjoyment or benefit of another piece of land the easement or profit is appurtenant thereto, and passes with it to any person to whom the land may pass, either by deed, devise or inheritance. The land so benefited is called the dominant estate, while the land so burdened is called the servient estate. From the standpoint of the servient estate the easement or profit is called a servitude. If there be no dominant estate, the right arising in favor of some person either for years, for life or in fee, and not for the benefit of any other land of which he may be the owner, a profit or easement in gross is created.¹ Each of these interests requires separate discussion in detail.

§ 275. **Profits, or Profits a Prendre, Appurtenant and in Gross.**—A profit is a right in one person to take from the land of another either a part of the soil, such as minerals of all kinds from mines, stones from quarries, sand and gravel; or part of its produce, such as grass, crops of any kind, trees or timber, fish from lakes or streams, game from the woods, seaweed, and the like.² The right to take water

1. See Washburn Easements (4th ed.), Bailey v. Stephens, 12 C. B. N. S. 91; Digby Hist. L. Real Prop. Van Rensselaer v. Radcliff, 10 Wend. (5th ed.), 181-185. (N. Y.) 639; right to take stone,

2. Right to cut and remove trees, gravel and seaweed, Hall v. Law-

is not a profit, since water, like air, is not owned absolutely by the owner of the land on which it is situated. He has only the right to use and appropriate it while on his premises, losing all right to it when it flows or passes from his land to the land of a neighboring owner.³

A profit is appurtenant when created for the benefit of a dominant estate. It is then in all respects, except the character of the user, of the same nature as an easement, passing with the dominant estate as an incident thereof whenever the estate passes by deed, devise or inheritance, so that the person entitled to the enjoyment of the profit at any time will be the person who is at that time the immediate owner of the dominant estate.⁴ If it be created in gross, in favor of some person, either for a term of years, for life, or in fee, and not for the benefit of any land of which he is owner, it exists as an independent property right, unconnected with the ownership of any land, and as such may be conveyed, devised and inherited like any other vested property right, the grantee, devisee or heir, as the case may be, taking the right to enjoy the profit for his personal use and ad-

rence, 2 R. I. 218; right to dig for and remove coal or other minerals, *Doe v. Wood*, 2 Barnew. & Ald. 724; *Huff v. McCauley*, 53 Pa. St. 209; *Silsby v. Trotter*, 29 N. J. Eq. 228; *Grove v. Hodges*, 55 Pa. St. 504; *Carnahan v. Brown*, 60 Pa. St. 23; *Grubb v. Grubb*, 74 Pa. St. 25; *Smith v. Cooley*, 65 Cal. 46; privilege of fishing or hunting involving the taking away of the fish or game caught, *Co. Litt.* 122a; *Wickham v. Hawker*, 7 M. & W. 63; *Race v. Ward*, 4 E. & B. 702; *Turner v. Hebron*, 61 Conn. 175; *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21; right to grow and remove crops, *Pierce v. Keator*, 70 N. Y. 419; right to take and remove apples from orchard, *Taylor v. Millard*, 118 N. Y. 224.

In *Huntington v. Asher*, 96 N. Y. 604, the court held that the right to cut and take ice from a pond on adjoining land of the grantor was a profit appurtenant to the land conveyed, the right having been granted for the use and benefit of the land so conveyed.

3. *Race v. Ward*, 4 E. & B. 702; *Borst v. Empie*, 5 N. Y. 33; *Goodrich v. Burbank*, 12 Allen (Mass.) 459. See *Huntington v. Asher*, 96 N. Y. 604, referred to in preceding note.

4. *Bailey v. Stephens*, 12 C. B. N. S. 91; *Pierce v. Keator*, 70 N. Y. 419; *Huntington v. Asher*, 96 N. Y. 604; *Grubb v. Grubb*, 74 Pa. St. 25, 33 (right to take ore for use of a smelting furnace).

vantage, exactly as the original owner of the profit had the right to enjoy it.⁵

A profit, like an easement, is incorporeal, in that it gives no present ownership of the land as such, nor of any part of it. It is a mere incorporeal right to enter and take the coal or other mineral, timber, crop, or other profit, giving no title or interest in the minerals, trees or crops until they are actually taken pursuant to the right.⁶ The same general rules, therefore, govern both profits and easements as to the mode of creating and transferring them. These rules are considered hereafter in connection with easements.⁷

5. Washburn Easements (4th ed.), 13; *Post v. Pearsall*, 22 Wend. (N. Y.) 425. See, also, cases in preceding note.

6. The distinction suggested by Washburn between profits and easements in gross, that a profit is a corporeal estate or interest in the land itself, since it involves the right to take part of the soil or its produce, and therefore it may be conveyed, devised and inherited, while an easement in gross cannot, in that it is a mere incorporeal right of user, cannot be sustained. A profit is incorporeal exactly as an easement is, in that it is a mere *right* to take the profit. The coal or other mineral, timber or crops which the owner of the profit may have a right to remove is in no sense his property until he exercises his right of removal. He therefore acquires no corporeal property right in the land. *Baker v. Hart*, 123 N. Y. 470. The all-sufficient reason why it may be conveyed, devised or inherited is that it is a definite and vested property right of value. There is no reason why it should not be capable of transfer like any other vested property right, the right of

alienation being of the essence of ownership. In no case, however, will its alienation be permitted to increase the burden imposed on the servient estate. That burden must remain the same. See discussion of alienability of easements in gross in the following section. See, also, following note. Thus the right to search for and remove minerals was held to be a profit, only, and not a grant of the minerals in the land. *Doe v. Wood*, 2 Barnew. & Ald. 724. If the grant be of a mine, with mining privileges, or of the exclusive right to take all the coal in a certain parcel of land, the thing granted is corporeal, all the mineral contained in the mine passes at once to the grantee; if the mere right to enter and dig coal and carry it away was given, nothing corporeal would pass and a mere incorporeal right or profit *a pendre*, would be created. *Baker v. Hart*, 123 N. Y. 470; *Glovinger v. Franklin Coal Co.*, 55 Pa. St. 9, 16; *Grubb v. Grubb*, 74 Pa. St. 9, 16; *Carnahan v. Brown*, 60 Pa. St. 23; Washburn Easements (4th ed.), 19.

7. See § 277, *et seq.*, *post*.

§ 276. **Easements in Gross.**—An easement, in the strict or narrower sense in which the term was used by the older writers and in the earlier cases, involves always the existence of a dominant estate to which it is appurtenant. As a practical matter nearly all easements are appurtenant to a dominant estate, and the term easement without qualification, now means as in the past, a right in the land of another for the benefit of a dominant estate to which it is appurtenant. It passes with the dominant estate as inseparably connected with it, the person who alone has at any particular time any right to the easement being the person who is at that time the owner of the dominant estate. It does not exist as a personal right, and cannot be enjoyed apart from the dominant estate. The easement cannot be conveyed to one person and the dominant estate to another. As long as the easement continues in existence it will pass with the dominant estate to a grantee, devisee or heir, though not expressly referred to in the deed or will, and even when expressly reserved or granted in terms to some one else. The attempt to reserve the easement or to convey it to a third person is simply void, unless it amounts to a release and therefore to a discharge of the easement.

The later authorities, however, very properly apply the term easement to similar rights in the land of another created for the benefit of some person to be enjoyed by him for life or for years or in fee, though not for the benefit of a dominant estate. An easement, like a profit, may, therefore, be appurtenant or in gross. Since there is no dominant estate in the case of an easement in gross, it cannot pass with land as an appurtenance thereof. It exists as a property right in its owner, exactly as in the case of a profit in gross and since it is a vested property right of value it may be conveyed, devised and inherited for exactly the same reasons that a profit in gross may be.⁸ There is consider-

⁸ *Goodrich v. Burbank*, 12 Allen Law, 125 N. Y. 380; *Lonsdale Co. v. (Mass.)* 459; *Mayor of New York v. Moies*, 21 L. Rep. 664; *White v.*

able authority in support of the doctrine that an easement in gross cannot be conveyed or assigned, devised or inherited because it is a mere personal privilege in the owner of the easement.⁹ But where it is granted to a person, his heirs and assigns, or in fee, to continue for all time, it is difficult to understand why it must be treated as a mere personal privilege coming to an end on the death of the owner. It is something more than a mere license; it is an incorporeal interest in the land. Where the burden imposed on the servient estate is definite and fixed, so that the transfer of the right, whether made to one person or to several persons, will not increase the servitude, there is no reason why it should not be capable of transfer by assignment *inter vivos*, by will or by inheritance. The reservation of the right in fee to take so much water as will flow through a conduit or pipe of a stated size, with the right to maintain and renew the pipe, creates an easement in gross which may be conveyed, devised and inherited as freely as a profit in gross, and for the same reasons.¹⁰ On the other hand a right of way in gross reserved in favor of a person in fee, cannot be assigned by him, since such transfer would involve changing and increasing the burden imposed on the servient estate. Such would be the obvious result in case the assignment be made to several persons. It would also be a possible result of an assignment to one person only, since the use of the way by that person might exceed the use of the way by the assignor.¹¹ The cases

Crawford, 10 Mass. 188; Owen v. Field, 102 Mass. 100; Hall v. Ionia, 38 Mich. 493 (*dictum*); Pinkum v. Eau Claire, 81 Wis. 301; Engel v. Ayer, 85 Me. 448; Shreve v. Mathis, 63 N. J. Eq. 170 (right of way).

9. Boatman v. Lasley, 23 Oh. St. 614; Tinicum Fishing Co. v. Carter, 61 Pa. St. 21; Hoosic Stone Co. v. Malott, 130 Ind. 21, 24; Ackroyd v.

Smith, 10 C. B. 164, 167, 188; Garrison v. Rudd, 19 Ill. 558; Knecken v. Voltz, 110 Ill. 264, 268; Washburn Easements (4th ed.), 13.

10. Goodrich v. Burbank, 12 Allen (Mass.) 459.

11. Boatman v. Lasley, 23 Oh. St. 614. But see Shreve v. Mathis, 63 N. J. Eq. 170.

may perhaps be reconciled under a general rule to the effect that an easement in gross may be assigned or devised and is therefore inheritable in all cases in which the user provided for is of a definite kind, so that the burden imposed on the servient estate will remain constant no matter who or how many enjoy the easement; but where the user is such that its transfer would or might increase the burden to the servient estate it cannot be assigned, devised or inherited. There is no exception to the principle that the owner of an easement or profit cannot increase the burden of the servitude by any transfer of part of the dominant estate where the easement or profit is appurtenant.¹² Nor can he increase the burden on the servient estate by any alienation of an easement or profit in gross. Subject to this rule it would seem that easements in gross, like profits in gross, may be conveyed, devised and inherited.

§ 277. Creation of Easements.—Easements and profits may be created *inter vivos*, by express grant or reservation, by implied grant or implied reservation, and by prescription. Since they are incorporeal interests they could not be created by livery, but only by grant or prescription.¹ Since

12. Thus where the profit is indivisible, as in the case of a right to estovers, a conveyance of part of the servient estate extinguishes the profit, since it cannot be exercised in favor of either part of the dominant estate, being indivisible. *Van Rensselaer v. Radcliff*, 10 Wend. (N. Y.) 639; *Livingston v. Ketchum*, 1 Barb. (N. Y.) 592. But where the profit is apportionable each part of the land will be entitled to its portion of the profit, as a right of pasturage of cattle *sans nombre*, this being a right to pasture so many cattle as may be kept on the dominant estate, or on any part of it, where part of the dominant estate

is conveyed to a third person. *Tyringham's case*, 4 Co. 35; so, also, of the right to take stone, gravel and seaweed for the benefit of the dominant estate. On a conveyance of part of the dominant estate the grantee acquired the right to take so much stone, gravel and seaweed as he might need to use on the part conveyed to him. *Hall v. Lawrence*, 2 R. I. 218. See, also, *Livingston v. Ten Broeck*, 16 Johns. (N. Y.) 14.

1. They could not be created by livery of seisin since there was nothing corporeal to hand over or deliver. "While, therefore, corporeal hereditaments were long transferable by mere

they are interests in land they cannot be created by parol under the Statute of Frauds.² A license created by parol may be revoked at any time, even though the licensee has incurred expense in making improvements. In some states an easement attempted to be created by parol or a parol agreement for an easement will be given effect in equity if it is supported by a valuable consideration and has been acted on by the persons in whose favor the promise was made, so that injustice would result if the promisor were permitted to withdraw from it, turning on the same principles as the specific performance of parol contracts for the sale of lands where the purchaser has entered and made improvements.³ In a few states a mere license created by parol will be enforced in equity if the licensee has changed his position in some material way by doing work or incurring expenditure relying on the continuance of the license, though there be no contract to continue the license or to create an easement.⁴ These cases involve a clear viola-

delivery of possession without any written words, the proper mode of disposing of incorporeal hereditaments alone, according to the common law, was by delivery of a sealed writing or *deed* of grant. Hence, corporeal hereditaments were said to lie in livery (that is, delivery), incorporeal in grant." Williams Real Prop. (17th ed.), 31.

2. *Wiseman v. Lucksinger*, 84 N. Y. 31; *Conkhite v. Conkhite*, 94 N. Y. 323; *Thompson v. McClarney*, 82 Pa. St. 174; *Cook v. Stearns*, 11 Mass. 533; *Nichols v. Luce*, 24 Pick. 102; *Bayhart v. Flummerfelt*, 43 N. J. L. 28.

3. *Dempsey v. Kipp*, 61 N. Y. 462; *Huff v. McCauley*, 53 Pa. St. 206; *Legg v. Horn*, 45 Conn. 415. See, also, cases in preceding note, also *Washburn Easements* (4th ed.), 28, 29.

In *Wiseman v. Lucksinger*, 84 N. Y. 31, the court said: "There are, no doubt, many cases in which courts recognize an equitable title to an easement without a deed, but there will be found in them either an express agreement for an easement, or an acquiescence or consent by conduct which has led to the erecting of permanent works or valuable and lasting improvements, or some other fact which would make the assertion of a legal title operate as a fraud on the persons setting up the equitable right." See, also, Ch. XIX, *post*.

4. *Lindeman v. Lindsay*, 69 Pa. St. 93; *Campbell v. McCoy*, 31 Pa. St. 263.

The right to revoke a mere license involving in no way a promise to give an easement or to continue the license, even though the licensee has

tion of the Statute of Frauds since they in result give effect to mere parol licenses as easements without adequate reason for interference by equity. The creation and revocation of licenses and their relation to easements are hereafter discussed in the chapter on licenses.⁵

§ 278. Creation of Easements by Express Grant or Reservation.—The usual way of creating an easement is by deed granting or reserving a privilege or right in the servient estate in favor of the dominant estate. As in other cases the deed will be construed in accordance with the natural and usual meaning of the language used. It will be construed as creating an easement appurtenant to a dominant estate, rather than an easement in gross, if such construction can naturally and reasonably be given it. Thus where a restrictive easement against building on the servient estate,⁶ or against using it for some forbidden purpose⁷ is created, it will be construed as an easement for the benefit of adjoining property retained by the grantor of the servient estate which is obviously benefited by the restriction, that being the manifest purpose, though the adjoining property is not referred to in the instrument. A tenant in common or joint tenant cannot by his sole act create an easement binding as a servitude upon the property so held in common or joint tenancy. The joining of all the tenants in the grant is necessary in such case. It is contrary to the nature of a joint tenancy or tenancy in common to

changed his position by incurring expense in the hope that the license will not be revoked, is well settled under the cases. Equity has no basis for interference in the absence of a promise to grant an easement or continue the license in some definite way, supported by a valid consideration, relying on which expenditures were incurred and improvements made.

Crosdale v. Lanigan, 129 N. Y. 604; *Springer v. Springer*, 49 N. J. Eq. 289; *Lake Erie R. Co. v. Kennedy*, 132 Ind. 274.

5. See Ch. XIX, *post*.

6. *Peck v. Conway*, 119 Mass. 546.

7. *Post v. Weil*, 115 N. Y. 361. On the general question, see, also, *Winthrop v. Fairbanks*, 41 Me. 307.

permit one tenant to affect the right of possession and enjoyment or of partition of the other tenants without their joint action, and to permit a cotenant to create such an easement by his sole act would necessarily have that result.⁸ A tenant in common or joint tenant may, however, *acquire* an easement in adjoining land for the benefit of the common estate, which will enure to the benefit of all the tenants, this resulting in an advantage to all, in no way interfering with the rights of his cotenants.⁹

Restrictive covenants contained in deeds forbidding certain uses of the property conveyed, or limiting the right to erect buildings thereon in any way, or in any other way restricting the use and enjoyment of the property conveyed for the benefit of land retained by the grantor, are really easements created by express reservation, the estate conveyed being the servient estate restricted for the benefit of the dominant estate, which latter is the property retained by the grantor.¹⁰ How far such covenants are enforceable in favor of persons to whom land has been sold theretofore subject to similar restrictions, they forming part of a common scheme, is considered hereafter in the chapter on Covenants Running With the Land.¹¹

A common form of creating easements by express grant is by conveying lots by reference to a map showing spaces reserved for streets, public squares and the like. Each vendee of a lot abutting on a street or square as shown on the map acquires an easement therein that the land so appropriated shall not be used for any inconsistent purpose, and

8. *Portmore v. Bunn*, 3 Dowl. & R. 145; *Philbrick v. Ewing*, 97 Mass. 133; *Crippen v. Morse*, 49 N. Y. 63; *Washburn Easements* (4th ed.), 46. See § 213, *ante*, on conveyances by tenants in common by metes and bounds.

9. See *Washburn Easements* (4th ed.), 47.

10. *Post v. Weil*, 115 N. Y. 361;

Avery v. N. Y. Central etc. R. Co., 106 N. Y. 142; *Columbia College v. Thatcher*, 87 N. Y. 311; *Columbia College v. Lynch*, 70 N. Y. 440; *Couderd v. Sayre*, 46 N. J. Eq. 386; *Stetson v. Curtis*, 119 Mass. 266. For a more detailed consideration of restrictive covenants, see *Covenants Running with the Land*, Ch. XVIII, *post*.

11. See Ch. XVIII, *post*.

he may secure an injunction preventing the grantor or any subsequent owner of the land so assigned to public use, or any other person, from closing or otherwise using such land in violation of the easements so acquired. The map becomes part of the deed, by reference, and the easements, therefore, arise by express grant rather than by implication.¹²

§ 279. Reservations and Exceptions.—An easement by express reservation arises when the grantor of land reserves an easement in the land conveyed for the benefit of land retained by him. The easement comes into existence by virtue of the reservation.¹ A reservation differs from an exception in that it creates something that did not exist before, while an exception is the retention by the grantor of something already in existence, it being excepted from the operation of the deed, and remaining in the grantor for that reason. Thus where the grantor conveys one of two adjoining tracts of land of which he is owner, reserving a right of way over the tract conveyed, or a right to take water from a spring thereon, or the like, for the benefit of the tract retained by him, the easement of way or to take water are created by reservation, they having had no existence as easements before, since a person cannot have an easement in his own land. On the other hand if the grantor

12. *Lennig v. Ocean City Ass'n*, 41 N. J. Eq. 606; *Coudert v. Sayre*, 46 N. J. Eq. 386; *Dill v. School Board*, 47 N. J. Eq. 421; *Matter of Leggett Ave.*, 80 App. Div. (N. Y.) 618; *Hay v. Knauth*, 36 App. Div. 612.

In *Johnson v. Shelter Island, etc. Ass'n*, 123 N. Y. 330, lots were sold with reference to a map indicating an open space for public use called "The Ramble," within which space the word "Chapel" was written, indicating a proposed building. The court refused to enjoin the erection of a hotel at

the place marked "Chapel," there having been no express covenant as to the building to be erected there, the court finding that the erection of the hotel would not interfere with the easement of the abutting lot owners.

1. *Bowen v. Conner*, 6 Cush. (Mass.) 132; *Winthrop v. Fairbanks*, 41 Me. 307; *Phoenix Ins. Co. v. Continental Ins. Co.*, 87 N. Y. 400; *Andrews v. National Sugar Ref. Co.*, 72 App. Div. (N. Y.) 551; *Mayo v. Newhoff*, 47 N. J. Eq. 31.

conveys land excepting a right of way through the land owned by a railroad company, or any third person or owner of adjoining land other than himself, the easement already in existence is excepted, so that the conveyance is made subject thereto.² An easement can never be created by exception, since exceptions deal only with easements or other property rights already in existence. But words of exception in a deed will be construed as a reservation where the context shows that the creating of a new right was intended, while words of reservation will be given effect as an exception where the obvious purpose was to except a right or thing already in existence.³

An easement cannot be created by reservation in favor of a stranger. It is in effect the taking back by the grantor of a right in the land conveyed as part of the conveyance, with the same force and effect as though the grantee had executed and returned a deed creating the easement at the time the deed of conveyance was delivered to him. Such a reservation in favor of a stranger, not a party to the transaction, is obviously void.⁴ An exception of an easement held by a stranger cannot operate to increase the easement in any way. Its only effect is to make the conveyance subject to the easement, relieving the grantor from liability for breach of covenant of title contained in his deed.⁵ At common law the word "heirs" was essential to the creating of an easement by reservation, exactly as by express grant, in order to create an easement in fee.⁶ On the other hand an exception did not require words of inheritance, the land or right excepted being already in existence in fee in the

2. *Winthrop v. Fairbanks*, 41 Me. 307; *Winston v. Johnson*, 42 Minn. 398.

3. *Emerson v. Mooney*, 50 N. H. 315; *Myers v. Bell Tel. Co.*, 83 App. Div. (N. Y.) 623; *Beardslee v. New Berlin L. & P. Co.*, 207 N. Y. 34.

4. *Beardslee v. New Berlin L. & P. Co.*, 207 N. Y. 34; *Haverhill Sav. Bank v. Griffin*, 184 Mass. 419.

5. See cases in preceding note.

6. *Ashcroft v. Eastern R. R. Co.*, 126 Mass. 196; *Simpson v. B. & M. R. Co.*, 176 Mass. 359.

grantor or third person, the exception merely taking it out of the operation of the deed.⁷ The modern rule, however,

7. *Bowen v. Conner*, 6 Cush. (Mass.) 132; *Emerson v. Mooney*, 50 N. H. 315; *Winthrop v. Fairbanks*, 41 Me. 307.

In *Bowen v. Conner*, *supra*, the parties were tenants in common, dividing the property by mutual deeds, a right of way over the outer parcel being expressly reserved in favor of the inner parcel, words of inheritance not being used. The court gave effect to the obvious intent to create a way in fee, declaring it to have been created by way of exception, the plaintiff to whom the inner parcel was conveyed having the right as tenant in common to cross at any point over the outer parcel *before* the conveyance, which right was excepted, as to the 30-foot strip, by the so-called reservation of a right of way thereover.

In *Dee v. King*, 77 Vt. 230; *Chappell v. N. Y. N. H. & H. R. Co.*, 62 Conn. 195; *Bridger v. Pierson*, 45 N. Y. 601, and *White v. N. Y. & N. E. R. R. Co.*, 156 Mass. 181, the ways reserved or excepted in each case had been in open and more or less continuous use from land retained over land conveyed by the instrument containing the reservation or exception. In each case they were given effect as exceptions of existing ways, making the use of words of inheritance unnecessary. On the other hand, in *Ashcroft v. Eastern R. R. Co.*, 126 Mass. 196, the right of way was reserved through a culvert which was to be kept in repair by the grantee, creating a new and distinct right not before existing in the grantor, and it was therefore held to be a reserva-

tion requiring words of inheritance. So in *Claffin v. B. & A. R. Co.*, 157 Mass. 487, a similar way to be kept in repair by the grantors was also held to be created by reservation since there was no evidence of an existing way.

It is submitted that in each of the above cases the easement was created in fact by way of reservation, a new and distinct easement which had no existence theretofore being created in each case. A man cannot have an easement in land belonging to himself, and the effect of the reservation in each case was to create an easement of way which had no existence theretofore. An owner has the right to use his land in any way and for any purpose. The logical effect of these cases would be to convert all reservations into exceptions, at least for the purpose of determining whether words of inheritance are necessary or not, since it is clear that the existence of an open use of one parcel for the benefit of the other can have no effect in this question, as the *right* to such a user would exist in the grantee whether it had actually been enjoyed before the conveyance or not. In New York and the many other states in which the use of the word "heirs" is no longer necessary, and where the intent of the parties governs, no such question could arise, it being obvious that the easement reserved was intended to continue during the continuance of the estate granted; in fee if the estate conveyed was in fee. As we shall see, an easement arising by im-

is that easements created by reservation will partake of the nature of the dominant and servient estates—if they are in fee the easement will also be in fee though words of inheritance are omitted in the reservation.⁸ But in the case of easements in gross words of inheritance are essential if they are to continue longer than for the life of the recipient, the presumption being that they are mere personal rights for life only in the absence of words of inheritance.

§ 280. Ways of Necessity.—When the owner of land conveys the inner portion thereof, retaining the outer portion abutting on the highway, the inner parcel being surrounded on every other side by the lands of strangers, a way of necessity arises as an implied term of the deed conveying the inner parcel, giving to the grantee of the inner parcel a right of way over the outer parcel to and from the highway. This easement is implied because of the evident necessity of such a way for the beneficial enjoyment of the

plied reservation due to an open, notorious and continuous user of the part granted for the benefit of the part retained, will be an easement in fee if the estate conveyed is a fee. It is the extreme of technicality to hold that where the easement is expressly reserved in a similar case the easement shall continue only for the life of the grantor because the word "heirs" is not used. The cases above referred to seek to avoid this and to give effect to the intention of the parties by calling these provisions exceptions, to which the technical common law rule did not apply. The courts should have declared them to be reservations, but that the word "heirs" was not required, since they necessarily were to be of the same duration as the estate conveyed, out of which they were reserved. The law has within itself the power of cor-

rection and growth. Precedent is no justification for the continuing of an absurdity. Error in or inapplicability of the old law should be recognized and corrected, not dodged as in these cases with the attendant confusion arising through the misuse of the term "exception."

8. *Coudert v. Sayre*, 46 N. J. Eq. 386 (covenant creating easement ran with the land); *Newhoff v. Mayo*, 48 N. J. Eq. 619 (easement created by a tenant for years continues only during the term); *Knecken v. Voltz*, 110 Ill. 264.

See, also, preceding note, the changes in the law having been accomplished in several instances by calling reservations exceptions, and applying to them the rule as to the use of the word "heirs," which applied at common law to exceptions.

land so conveyed. Without it the grantee could not get to or from his property without becoming a trespasser. The easement arises, therefore, by necessary implication as an implied term of the deed exactly as though it had been created by express terms, in the absence of any express provision to the contrary.¹ Since it arises out of the necessity

1. *Packer v. Welsted*, 2 Sid. 39, 111; *Clark v. Cogge*, Cro. Jac. 170; *Pinnington v. Galland*, 9 Ex. 1; *Smyles v. Hastings*, 22 N. Y. 217; *Palmer v. Palmer*, 150 N. Y. 139; *Schmidt v. Quinn*, 136 Mass. 575; *Collins v. Prentice*, 15 Conn. 39; *Seymour v. Lewis*, 13 N. J. L. 439; *Jay v. Michael*, 92 Md. 198.

Strict necessity is required. Mere convenience, or the saving of expense in building a road or removing a natural obstruction to a way over the land of the grantee of the inner parcel will not be enough to give rise to this easement. Thus if he can reach the land in question by boat over navigable waters, it has been held that no way of necessity arises. *Turnbull v. Rivers*, 3 McCord (S. C.) 131; *Kingsley v. Goldsborough L. Im. Co.*, 86 Me. 279; *Burlew v. Hunter*, 41 App. Div. 148, 151.

Where he has another way, obstructed by a slough and a ditch which could be made passable for \$1000, no way of necessity can be implied. *Carey v. Rae*, 58 Cal. 159. That the way which he has is steep or narrow, or a long way around is no reason for implying a way of necessity. *Stevens v. Orr*, 69 Me. 323; *Ogden v. Grove*, 38 Pa. St. 487; *Stuyvesant v. Woodruff*, 21 N. J. L. 133.

Practical necessity, however, as distinguished from absolute necessity,

will give rise to this easement over the outer parcel retained or conveyed as the case may be. The question in each case is this: Is the existence of such a way necessary as a practical matter for the use and enjoyment of the land conveyed in view of the purpose and intent of the parties to the conveyance? *Schmidt v. Quinn*, 136 Mass. 575, and cases above cited.

Of course a way of necessity never exists over the land of a stranger. It arises by implied grant or reservation where the common owner of two parcels conveys or devises one of them, retaining the other, or conveys or devises both parcels to different persons. *Nichols v. Luce*, 24 Pick. (Mass.) 102; *Woodworth v. Raymond*, 51 Conn. 70, 75; *Ellis v. Basset*, 128 Ind. 118. In Louisiana and under the French Code an easement arises in such case over the lands of a stranger on making due compensation. Code Map, §§ 682-685; *Martin v. Patin*, 16 La. 57. Transfer by operation of law, as by sale of one parcel under execution, has the same effect as a voluntary transfer. *Schmidt v. Quinn*, 136 Mass. 575. But where the land is acquired by escheat or by condemnation proceedings no way of necessity arises, since a way may be condemned by the state or city, and paid for. *Proctor v. Hodgson*, 10 Ex. 824; *Banks v. School Directors*, 194 Ill. 247.

of the case it continues only so long as the necessity continues to exist, and if the grantee of the inner parcel subsequently acquires land directly connecting the parcel in question with the highway, or if a new street or highway is put through or a private way to the highway is subsequently acquired, the way of necessity immediately comes to an end, the necessity on which it depended having ceased.² In the same way and for the same reason a way of necessity arises by implied reservation whenever the owner of the two parcels sells the outer parcel retaining the inner one.³

The owner of the outer parcel has the right to designate the course and limits of the way, provided he does so in a reasonable manner, consistent with the reasonable enjoyment of the easement by the owner of the inner parcel. If he refuses or unreasonably neglects to do so, the owner of the inner parcel may lay out the way himself, he doing so without unreasonably burdening the outer parcel or unduly interfering with its owner's right of enjoyment.⁴ The way must be kept in repair by the owner of the inner parcel, the responsibility for its condition as a way resting upon him.⁵

A way of necessity is a general right of way for every use and purpose to which the inner parcel may be put in full and complete enjoyment of its ownership.⁶

2. *Palmer v. Palmer*, 150 N. Y. 139; *N. Y. Life Ins. Co. v. Milnor*, 1 Barb. Ch. (N. Y.) 353; *Pierce v. Selleck*, 18 Conn. 321; *Viall v. Carpenter*, 14 Gray (Mass.) 126; *Ballard v. Demon*, 156 Mass. 449. In other respects ways of necessity may be terminated like other easements of way. See §§ 295, 296, *post*.

3. See cases in note 1, *supra*.

4. *Palmer v. Palmer*, 150 N. Y. 139; *Bolton v. Bolton*, L. R. 11 Ch. Div. 968; *Dunham v. Pitkin*, 53 Mich. 504.

Of course if a way is already in existence having been laid out and in use before the sale, the way of necessity will usually be continued over the same course. *Schmidt v. Quinn*, 136 Mass. 575; *Whitehouse v. Cummings*, 83 Me. 91; *Ellis v. Bassett*, 128 Ind. 118.

5. See § 294, notes 14, 15, 16, *post*.

6. *Whittier v. Winkley*, 62 N. H. 338; *Camp v. Whitman*, 51 N. J. Eq. 467; *Myers v. Dunn*, 49 Conn. 71. See § 294, note 7, *post*.

§ 281. **Easements Created by Implied Grant or Reservation.**— Where the owner of a parcel of land conveys part of it, retaining the other part, if it appears that at the time of the conveyance the part retained has been subjected to some use or burden for the benefit of the part conveyed in a way, which is open, notorious, permanent, and of value to the part conveyed, an easement arises by implied grant, giving to the grantee of the part so conveyed the right to have the use or burden continue as theretofore for the benefit of his property. The question on which each case turns is this: Did the purchaser as an average reasonable man have the right to believe that he was acquiring with the property conveyed to him an easement in the property retained by the grantor, and did the amount paid by him for the property include payment for such easement because of the apparent physical situation of the two parcels with reference to one another at the time of the sale? If he had the right to believe that he was purchasing and paying for the easement in question because of the physical situation of the two parcels then existing, the law will give effect to the easement as an implied term of the deed, exactly as though it had been created therein by express terms. The inadvertant failure to expressly provide for it will not prevent it from arising, the sale having been made with the tacit understanding that the easement should arise.⁷

It is, of course, obvious that no easement in any form exists in such case until the conveyance takes place, since the grantor could not have an easement in his own property. Therefore the easement arises, if at all, as an implied term of the deed, and does not pass as an existing appurtenance to the property conveyed.⁸

It is difficult to understand on what *legal* principle the courts have acted in giving effect to easements arising in this way, particularly since the enactment of the Statute of

7. See cases cited and discussed in section following.

8. See cases cited under section following.

Frauds. The unexpressed intent of the parties is given effect and a new and distinct legal interest in land is created without a writing and without a parol agreement other than the agreement to be implied from the circumstances. The courts seem to have disregarded technicalities and to have adopted the rule which justice and common sense and practical needs of men demanded. The principle on which the rule is based is very similar to the principle on which equity acts in many cases, such as in enforcing parol contracts for the sale of land in cases of partial performance, the enforcement of incomplete mortgages, and the like. The easement is implied in order that justice may be done and that what would otherwise amount to a fraud as against the purchaser may be prevented.

It is generally stated that the user required to give rise to an easement by implied grant must be open and notorious, continuous and reasonably necessary to the enjoyment of the property conveyed. Here as elsewhere in the law there has been a tendency to apply these rules in a technical way without regard to the reasons on which they are based. The user must be open and notorious, so that the average person in the position of the purchaser would observe the way in which the parcel retained by the grantor has been applied in a permanent way to the use of the parcel conveyed. It must be continuous, in the sense that it is permanent, obviously intended for continued and permanent use as incident to the enjoyment of the property conveyed.⁹ It is generally said that the user must be reasonably necessary to the enjoyment of the parcel transferred, but it is quite obvious that in many cases no necessity exists. If the user imposed on the servient parcel is an open and permanent adaptation or appropriation of that parcel for the benefit of the dominant parcel to the extent of the user, and is of such apparent value that the average man would take it into consideration in determining the value of the parcel

9. See notes under following section, particularly notes 2, 3, 4, 6, 8.

so benefited, and in fixing the price to be paid, the easement will be implied though a substitute could easily be secured at some additional expense, making the user in no accurate sense of the term either strictly or reasonably necessary to the beneficial enjoyment of the property. These principles may be best illustrated in connection with a consideration of the more important classes of cases of easements of this nature, which are discussed in the following section.¹⁰

Easements by implied reservation arise where the grantor reserves the parcel so benefited, conveying the parcel subjected to the user in an open and permanent way. The basic principle in both cases is the same, viz.: the easement will be implied in accordance with the apparent intention of the parties, where reasonable men in their place would have intended that the easement should arise under the circumstances of the case. In case of doubt, however, of whether or not the parties intended an easement to arise, the doubt will be resolved in favor of the grantee because of the rule of construction that a deed must be construed most strongly against the grantor. The tendency of the later cases, cited and discussed hereafter, is to hold that no easement will arise by implied reservation except in cases of strict or practical necessity, ignoring the fact that they turn on exactly the same principle as easements created by implied grant, and that a rule of construction, such as that above referred to, can have no application except in cases of real doubt. Where the intent is clear there is no room for construction.¹¹

§ 282. Easements by Implied Grant; The More Important Classes of Cases.— Ways of necessity are easements created by implied grant or reservation, as we have seen, but they belong and are treated as a class by themselves, because they do not depend on an existing user of one parcel for the

10. See note 10, section following.

11. See § 283, *post*.

benefit of the other at the time of the severance of the title to the two parcels.¹

Where the owner of two parcels lays out and constructs a visible and permanent roadway over one parcel to the benefit and advantage of the other, obviously adding to its value, on the conveyance of the parcel so benefited an easement of way arises by implied grant. The user is open and notorious, continuous in that it is a permanent structure appropriating part of the land retained, and though not strictly necessary as is a way of necessity, other means of access to the highway existing, it adds to the value of the parcel conveyed, and the purchaser as a reasonable man had a right to believe that he was acquiring with the land the right to the way.² On the other hand where no road-

1. See § 280, *ante*.

2. In *Watts v. Kelson*, L. R., 6 Ch. 166, the court said: "In *Langley v. Hammond* (L. R., 3 Ex. 161), Baron Bramwell expressed an opinion, in which we concur, that even in the case of a right of way, if there was a formed road made over the alleged servient tenement, to and for the apparent use of the dominant tenement, a right of way over such road might pass by a conveyance of the dominant tenement with the ordinary general words."

In *Brown v. Alabaster*, L. R., 37 Ch. Div. 490, a narrow back way led to the rear gardens of several houses, with gates opening therefrom into the houses. The court held that on the conveyance of two of these houses a right of way over the other property retained by the grantor arose by implication "because, being a formed road, it is considered by the authorities, in cases like this, to be a continuous and apparent easement—by implied grant without any large general words, or, indeed, without

any general words at all." The court cites and discusses several English cases of the same nature in which a similar position was taken.

In the following cases easements of way were held to arise by implied grant or reservation, the intention to create a permanent way over one parcel for the benefit of the other being manifest. *Davis v. Sear*, L. R., 7 Eq. Cas. 427; *France's Appeal*, 96 Pa. St. 200; *Overdeer v. Updegraff*, 96 Pa. St. 110; *Cannon v. Boyd*, 73 Pa. St. 179; *Outerbridge v. Phelps*, 58 How. Pr. (N. Y.) 77; *Huttemeier v. Albrow*, 18 N. Y. 48 (right to use of alley in regular use for benefit of house and lot conveyed, created by implied grant); *Mitchell v. Siepel*, 53 Md. 251 (holding that such way would not arise by implied reservation); *Goodall v. Godfrey*, 53 Vt. 219; *Leonard v. Leonard*, 7 Allen (Mass.) 277, 283. *Contra*, *Stevens v. Orr*, 69 Me. 323; *Warren v. Blake*, 54 Me. 276; *Doliff v. Boston & M. R. R. Co.*, 68 Me. 173.

In *Larsen v. Peterson*, 53 N. J.

way is laid out or alley-way appropriated to the use of the land conveyed, no easement arises out of a mere occasional passing over the parcel retained in the enjoyment of the parcel conveyed. Such user of land as a way without building a road or in any other respect permanently appropriating the land affected for the benefit of the land conveyed, is a good illustration of a user which is not continuous in that it is not permanent and is evidenced only by occasional acts of user and the tracks or marks that may result therefrom.³ Other illustrations of non-continuous acts of user are the entering upon land for the purpose of drawing water from a well or cistern, the right to draw a seine upon the shore, and the like.

Eq. 88, the court said: "I stop here to say that the distinction between a watercourse and a formed and metaled road constructed for permanent use is quite thin, and there have been expressions of judges in modern times intimating an inclination to hold that where a dwelling or other such tenement is conveyed with an artificially formed road leading to it over other lands of the grantor which are reserved, a right of way ought to be held to pass."

3. *Fetters v. Humphreys*, 18 N. J. Eq. 260, is decided on this ground, though a border line case. The testator had erected a stable on one lot facing on another belonging to him. and he used the second lot in getting to and from the stable, an ornamental flower garden taking up the rest of the rear of the first lot on which the stable stood. An alley left between buildings erected on the adjoining lot leading to a side street had been used as an approach to the stable; though there was nothing else to show that it had been left or created for that purpose, and no road

had been constructed. The court held that on the testator's devising the lots to different persons no way by implication arose over the alley in question, since the devisee of the lot with the stable could cut a road through the flower garden to the street adjoining her lot. The user was not necessary or continuous within the meaning of the rule. It is submitted that if it had appeared that the alley-way had been left as a permanent approach to the stable an easement would have arisen by implication under the will.

In the following cases the courts refused to recognize ways by implied grant, they being merely casual ways used occasionally and not constructed roads, or not of obvious value to the land conveyed: *Worthington v. Gunison*, 2 E. & Ellis 618; *Plympton v. Converse*, 42 Vt. 712. Compare this case with *Gordall v. Godfrey*, 53 Vt. 219, where the way led to the back of the house in question, which house covered the entire front of the lot. It was essential to the reasonable enjoyment of the house and lot.

Drains, water pipes or conduits, race-ways and rights of flowage in connection with water power in the operation of mills, and other water rights may all be classed together as easements frequently arising by implied grant, constituting the most usual and important class of such easements. Thus if the owner of a house sells it with a drain leading therefrom through land which he retains, if the drain is open and visible, or is indicated so that its existence might be discovered by ordinary investigation, the purchaser of the house acquires an easement of drainage by implied grant over the land retained.⁴ No difficulty arises in the case of an open ditch or drain where it obviously adds to the value of the property conveyed. It is continuous in that it is a permanent use of one parcel for the benefit of the other.⁵ In the case of covered drains the question presented is whether it is such an open user of the parcel retained for the benefit of the parcel conveyed that the purchaser as a reasonable man had the right to believe that he was acquiring and paying for the easement. Where it is hidden from observation, and there is nothing in the situation of the

4. *Pyer v. Carter*, 1 H. & N. 916, the court holding that the easement to continue the drain arose by implied reservation, though the drain was entirely covered, and the defendant purchaser testified that he was not aware of the drain at the time of the purchase, the court saying that because of the relation to each other of the two parcels the defendant "must have known that some drainage then existed, and if he had inquired he would have known of this drain. * * * By '*apparent signs*' must be understood not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject." See next section.

Thayer v. Payne, 2 Cush. (Mass.) 327 (drain necessary to beneficial enjoyment of property conveyed); *Johnson v. Jordan*, 2 Met. (Mass.) 234 (recognizes rule that easement would arise in such case by implied grant, but not by implied reservation when the parcel benefited is retained by the grantor, and not in case of simultaneous conveyances of the two parcels, it appearing that another drain could be made at a reasonable cost without encumbering the second parcel). See, also, cases in notes following.

5. *Munsion v. Reed*, 46 Hun (N. Y.) 399. See, also, *Curtiss v. Ayrault*, 47 N. Y. 73.

two parcels to indicate its existence arising out of some need thereof, no easement arises.⁶ But where an upper parcel would naturally be drained over the lower parcel, so that a drain through the lower parcel might reasonably be looked for, and would be disclosed on reasonable investigation, the easement will arise by implied grant.⁷

Where the dominant parcel so conveyed is supplied with water through pipes or conduits leading from springs or reservoirs situated on the parcel retained, an easement arises by implied grant, all the requisites being present, the user being open and notorious, continuous in the sense of a permanent fixture ready for use at any time for the benefit of the dominant parcel, and adding to its value in a definite way.⁸ Though the pipes are not in use all the time, as where the pipe led from a well on the land retained to a kitchen sink in the house conveyed through which water might be pumped, the user is continuous in that the pipe is always there as a permanent fixture burdening the servient parcel, ready for use whenever the owner of the house might desire to pump water from the well.⁹ In most of these cases, if not in all, the user is in no accurate sense of the term necessary to the beneficial enjoyment of the property. Water can always be obtained, either by sinking a well or from public water companies. The term "necessary" as used in this connection is inaccurate and misleading and should be discontinued. The user is said to be necessary *to the beneficial enjoyment* of the dominant parcel, though

6. *Butterworth v. Crawford*, 46 N. Y. 349 (hidden drain leading from vault under outhouses. Nothing to indicate existence or need of drain. No easement arose by implied grant).

7. See note 5, *supra*. On question of open and visible marks or signs of the user in connection with water pipes or conduits, see *Tooth v. Bryce*, 50 N. J. Eq. 589; *Larsen v. Peterson*, 53 N. J. Eq. 88.

8. *Nicholas v. Chamberlain*, Cro. Jac. 121; *Watts v. Kelson*, L. R., 6 Ch. 166; *Spencer v. Kilmer*, 151 N. Y. 390; *Paine v. Chandler*, 134 N. Y. 385; *Tooth v. Bryce*, 50 N. J. Eq. 589; *Larsen v. Peterson*, 53 N. J. Eq. 88.

9. *Larsen v. Peterson*, 53 N. J. Eq. 88.

water or drainage or a way or other benefit involved in the case may be secured in other ways at increased expense. Where a substitute in all respects equal to the easement claimed can be secured by the expenditure of a reasonable sum of money it is obvious that the easement is not necessary to the beneficial enjoyment of the property. The easement arises because the user is of *value* to the parcel conveyed, the purchaser having considered it as part of what he had purchased and paid for in acquiring the property.¹⁰

10. This principle is clearly recognized in the later and better considered cases. Thus in *Tooth v. Bryce*, 50 N. J. Eq. 589, the court said, in referring to cases in which the word "necessary" had been used as a requisite of easements arising by implied grant: "But I think that an examination of them will show that in most, if not all, of those instances, * * * the so-called 'necessity' upon which the judges relied, was, in fact, no necessity at all, but a mere beneficial and valuable convenience." The court then proceeds to examine the leading English and American cases, pointing out that the user in each case was in no proper sense "necessary."

In *Curtis v. Ayrault*, 47 N. Y. 73, where a ditch had been dug making an open watercourse through the parcel subsequently sold, the court said: "It is the open and visible effect which the change has wrought which is presumed to influence the mind of the purchaser. The question is, did the purchaser, in arriving at the price he would pay, consider, and have a right to consider, as an element of the value of the land he was bidding for, the benefits he derived from the artificial channel."

In *Paine v. Chandler*, 134 N. Y.

385 (easement of pipe or aqueduct from spring), the two ideas are confused. The court said: "Undoubtedly, an easement to pass by implication must be necessary to the enjoyment of the estate granted, but the necessity required is a reasonable, not an absolute one. Mere convenience would not be sufficient. * * * The privileges or right implied must be of *value* to the estate granted, *which the grantee has estimated as an advantage to the estate and paid for in his purchase.*" It is submitted that "reasonable necessity" is a contradiction in terms and is unintelligible. In *Spencer v. Kilmer*, 151 N. Y. 390, involving right to aqueducts from springs, etc., to a fish pond, the court said: "When the owner of the tract of land conveys a distinct part of it to another he impliedly grants all those apparent and visible easements which at the time of the grant were in use by the owner for the benefit of the part so granted, and which are essential to a reasonable use and enjoyment of the estate conveyed. The rule is not limited to continuous easements or to cases where the use is absolutely necessary to the enjoyment of the thing granted. It applies to those artificial arrangements which openly

Where a mill is sold with a raceway leading from a reservoir on land retained by the grantor, or with a spillway through which waste waters are discharged from the mill extending through lands retained by him, the grantee acquires an easement that the same user continue.¹¹ So where he purchases a water power site, with a dam of a defined height, he acquires therewith the right to flow land above the dam retained by the grantor to the extent necessary in raising the head of the water to the height of the dam. In these cases the user is open and notorious, continuous in that it is a permanent use of the servient parcel, and of obvious value to the mill property, though not necessary since steam power could be substituted for water power.¹²

Other illustrations of easements arising by implied grant are easements of support, where a building is sold supported in part by a building on an adjoining lot retained by the grantor,¹³ and easements of light and air through windows in the building sold overlooking land so retained.¹⁴ The general rule in the United States is that no easement of light and air will be implied in such case, there being in fact no appropriation of the adjoining vacant land for any

exist at the time of the sale *and materially affect the value of the thing granted.*"

11. *Wells v. Garburr*, 132 N. Y. 430; *Rackley v. Sprague*, 17 Me. 281; *Bliss v. Kennedy*, 43 Ill. 71; *Perrin v. Garfield*, 37 Vt. 312; *Siebert v. Levin*, 8 Barr (Pa.) 383; *Elliott v. Sallee*, 14 Oh. St. 10; *Morgan v. Mason*, 20 Oh. 401.

12. *Wells v. Garburr*, 132 N. Y. 430 (right to flow land conveyed did not arise by implied reservation because carrying the dam to the additional height was not shown to be at all required in order to operate the mill in question. Therefore, intent to reserve an easement of flowage

was not shown). See, also, cases in preceding note.

13. *Richards v. Rose*, 9 Exch. 218; *Rogers v. Sinsheimer*, 50 N. Y. 646; *Morrison v. King*, 62 Ill. 30; *Adams v. Marshall*, 138 Mass. 228.

14. *Wheeldon v. Burrows*, L. R., 12 Ch. Div. 31; *Allen v. Taylor*, 16 Ch. Div. 355; *Phillips v. Low*, L. R., 1 Ch. 47 (will not arise by implied reservation in favor of grantor); *Greer v. Van Meter*, 54 N. J. Eq. 270; *Sutphen v. Therkelson*, 38 N. J. Eq. 318; *Janes v. Jenkins*, 34 Md. 1. See *Renneson's App.*, 94 Pa. St. 147, 153, and *Robinson v. Clapp*, 65 Conn. 365, 385.

such purpose.¹⁵ Where an apartment or office is leased with windows looking out on a back lot or court appropriated to the building for the obvious purpose of supplying light and air an easement during the term arises, the back yard or court going with the building, and the easement of light and air being clearly intended to arise as part of the thing demised.¹⁶

Where the owner of an entire tract changes the natural course of a stream flowing through it, and later sells part of the tract, he will not be permitted to change the course of the stream again to the damage of the vendee of the parcel sold, he having purchased with reference to the open, visible situation as it existed at the time of the sale.¹⁷ So where a watercourse is created by ditching, or the like, the purchaser of part of the tract along the watercourse will acquire an easement therein, arising, however, as a natural right included within the thing demised, rather than by implied grant.¹⁸

§ 283. Easements Arising by Implied Reservation.—In the earlier cases, in the different situations discussed in the last two sections, it seems to have made little difference whether the parcel benefited was conveyed or retained by the grantor, the easement nevertheless arising where the user was open, continuous in the sense of being permanent, and of obvious value to the parcel benefited, arising by implied grant where that parcel was granted, by implied reser-

15. *Keats v. Hugo*, 115 Mass. 204; *Mullen v. Stricker*, 19 Oh. St. 135; *Kennedy v. Burnap*, 120 Cal. 488, 490; *Myers v. Gemmel*, 10 Barb. (N. Y.) 537; *Haverstick v. Supe*, 33 Pa. St. 368.

16. *Doyle v. Lord*, 64 N. Y. 432; *Case v. Minot*, 158 Mass. 577. In New Jersey, in accordance with the cases cited in note 14, *supra*, the tenant of a building with windows over-

looking vacant adjoining property retained by the landlord, in no way appropriated to the house, acquires an easement of light and air as an implied term of the lease. *Ware v. Chew*, 43 N. J. Eq. 493.

17. *Lampman v. Milks*, 21 N. Y. 505; *Roberts v. Roberts*, 55 N. Y. 277; *Watts v. Kelson*, L. R., 6 Ch. Ap. 166.

18. *Curtiss v. Ayrault*, 47 N. Y. 73

vation when that parcel was retained and the servient parcel was conveyed.¹ By the later cases in England the rule laid down in *Pyer v. Carter* has been in effect overruled, the rule as stated by the later cases being that no easement will arise by implied reservation except where the user in question is strictly necessary to the enjoyment of the property retained.² In the United States the tendency has been to

1. *Pyer v. Carter*, 1 H. & N. 916 (the court holding that an easement in a drain through land conveyed arose by implied reservation in favor of the grantor, though the drain was concealed from sight, and was disclosed only by the general character of the ground as indicating that the one parcel was necessarily or probably drained through the other); *Lampman v. Milka*, 21 N. Y. 505 (dicta); *Seymour v. Lewis*, 13 N. J. Eq. 439; *Kelly v. Dunning*, 43 N. J. Eq. 62; *Ormsby v. Pinkerton*, 159 Pa. St. 458; *Geible v. Smith*, 146 Pa. St. 276; *Steinke v. Bentley*, 6 Ind. App. 663.

2. In *Suffield v. Brown*, 4 De G. J. & S. 185, the court said, referring to an extract from *Gale on Easements*: "But I cannot agree that the grantor can derogate from his own absolute grant so as to claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements enjoyed by an adjoining tenement which remains the property of him, the grantor." The court adds that, considering the so-called easements as appurtenant to the adjoining tenements they may be released, "and the absolute sale and grant of the land on or over which they are claimed is inconsistent with the continuance of anything abridging the complete en-

joyment of the thing granted which is separable from the tenement retained, and can be aliened or released by the owner." The court expressly states that *Pyer v. Carter* was not rightly decided. All of this was *dicta*, since the user involved was clearly discontinuous, viz.: The occasional extending of the bowsprit of large ships when in the dock over the strip of land conveyed, there being nothing to indicate any such easement except the occasional user.

In *Wheeldon v. Burrows*, L. R., 12 Ch. Div. 31, the court refused to imply an easement of light and air to windows in a building overlooking the adjoining land conveyed, though such easement would arise by implied grant if the building with the windows had been sold and the land retained. The court treats *Pyer v. Carter* as overruled, and bases its decision on the principle that the grantor shall not derogate from his own grant. The court recognizes as exceptions (1) ways of necessity, which arise by implied reservation as by implied grant; (2) mutual easements of support between contiguous buildings with walls supporting one another, or with a single party wall. In general, the rule laid down in this case is that "if the grantor intends to reserve any right over the tenement granted it is his

follow the later English cases, the courts generally stating that an easement will arise by implied grant where the user is "*reasonably necessary* to the beneficial enjoyment of the property conveyed," or, more properly, where it obviously adds to the value of such property, so that the purchaser had a right to believe that he was acquiring and paying for the easement, while such easement will be implied by reservation in favor of the grantor only where strict necessity exists.³ The reason for this distinction, as stated by the

duty to reserve it expressly in the grant." Where both lots are sold at the same time the easement of light and air arises in England, as it does where the house with windows is first conveyed. *Allen v. Taylor*, 16 Ch. Div. 355; *Swansborough v. Coventry*, 9 Bing. 305.

In *Union Litterage Co. v. London Graving Dock Co.*, L. R., 2 Ch. 557 (1902), the court lays down the rule that to create an easement by implied reservation the user must not only be necessary to the beneficial enjoyment of the parcel retained, but so necessary that without it the parcel cannot be used at all.

3. In *Carbrey v. Willis*, 7 Allen (Mass.) 364, where the lower parcel was sold under a mortgage with a drain extending through it from a house on the upper parcel retained by the mortgagor of the lower parcel, the court said: "We think the true rule of construction is this: that no easement can be taken as reserved by implication unless it is *de facto* annexed and in use at the time of the grant, and is necessary to the enjoyment of the estate which the grantor retains. And this necessity cannot be deemed to exist if a similar privilege can be secured by reasonable trouble and expense."

In *Johnson v. Jordan*, 2 Met. (Mass.) 234, a similar rule is laid down. Strict necessity of the user is made the test; a substitute means of drainage, or other user, procurable at reasonable expense, prevents the user from being *necessary*, the implication being that if the substitute cannot be secured except at disproportionate expense, the easement would arise by implied reservation. In this case the two parcels were conveyed simultaneously, and the easement of drainage was held not to arise, since another equally effective drain could be made at slight expense, it being the evident intention that each purchaser should take his parcel free of any easement in favor of the other parcel.

These cases are obviously based on the true principle of the intent of the parties as disclosed by the particular facts involved in each case. In *Carberry v. Willis* the court said: "Where the easement is only one of existing use and great convenience, but for which a substitute can be furnished by reasonable labor and expense, the grantor may certainly cut himself off from it by his deed, *if such is the intention of the parties*. And it is difficult to see how such an intention could be more

courts, is the rule that a grant must be construed most strongly against the grantor, or as sometimes expressed, a

clearly and distinctly intimated than by such a deed and warranty" (without express reservation).

In *Tooth v. Bryce*, 50 N. J. Eq. 589, where an easement to the use of a pipe leading from a spring, the water being forced to the parcel sold by a ram, was held to have arisen by implied grant, the court, by way of dicta, approves of the distinction taken in the English cases, as discussed in the preceding note, but admits that strict necessity is not necessary to an easement by implied reservation any more than to an easement by implied grant under the cases in New Jersey.

In *Wells v. Garburr*, 132 N. Y. 430, where an easement of flowage in favor of a water power was held not to have arisen by implied reservation, there having been nothing to show that the right to maintain the dam at the greater height was at all necessary to the operation of the mill, or that the flowage of the land conveyed existed as a physical fact at the time of the conveyance, the court uses this language, which was obviously dicta: "Where the owner of two parcels of land conveys one by an absolute and unqualified deed, we think that an easement will be implied in favor of the land retained by the grantor and against the land conveyed to his grantee, only in case the burden is apparent, continuous and strictly necessary for the enjoyment of the former" (citing many cases). But after pointing out that no "necessity" in any sense was shown to exist in this case the court added: "The doctrine of implied

reservation rests upon the presumed intention of the parties as it is gathered from the conveyance, interpreted in the light of the circumstances surrounding them when it was executed and with reference to which, as existing facts, they are supposed to have contracted. If it appeared that the mill could not be operated without overflowing the plaintiff's land, it would be cogent, if not conclusive proof of that strict necessity which does not create the easement, but is simply evidence of the intention of the parties. If, on the other hand, it appeared that owing to the slight declivity the accumulation of water was insignificant, and that the mill property *was worth substantially* as much without the right in controversy as with it, there would be no proof of "necessity," and nothing upon which an implication in favor of the mortgagor or grantor could rest."

This clearly indicates the true rule as stated in the text. The whole question is what the parties in each case intended, judging them as reasonable men. Certainly the English rule, that the user must be absolutely necessary in order that the parcel retained may be used at all for the purposes intended, finds no support in the American cases. The "strict necessity" referred to in the American cases amounts only to this, the user must be so valuable and important to the parcel retained as to remove all reasonable doubt of the parties having intended the easement to arise, since in case of doubt, the presumption against the grantor

grantor will not be permitted to derogate from his own grant.

But this principle that a deed must be construed most strongly against the grantor is only a rule of construction. It can have no application except in case of doubt as to what the parties intended. Where the user is open and visible, of a permanent nature, obviously intended as a permanent provision for the use and enjoyment of the parcel retained, so that the purchaser must have understood that the user was to continue as a burden imposed on the estate conveyed to him, there is no room for the applying of this rule of construction, and the easement will arise by implied reservation, exactly as it would have arisen by implied grant, were the other parcel the subject of the conveyance. The principle on which the two cases turn is in every respect identical. The question in both cases is this, Did the parties as reasonable men with average mental qualities intend that the open, permanent and obviously valuable user should continue after the conveyance of one parcel and the retention of the other? If they did then it is as obviously unjust to refuse the grantor the benefit of the easement by reservation as it would be to refuse it to the grantor by implied grant. If the grantor paid a larger sum for the property because of the easement which he believed that he was acquiring as part of the dominant parcel so conveyed to him, so also the grantor, in the other case would have accepted a smaller sum for the servient parcel conveyed to the grantee in the belief that his user of the parcel so conveyed was to continue. The English courts have been led to take a wrong position by mistaking a mere rule of construction for an all-controlling maxim, and by losing sight of the underlying principle. It is be-

would apply, and the easement would not be implied in his favor, while in the case of a conveyance of the parcel benefited the presumption in a similar case would be in favor of the

grantee, and the easement would arise by implied grant. See, also, *Burns v. Gallagher*, 62 Md. 462; *Mitchell v. Seipel*, 53 Md. 251; *Sullivan v. Ryan*, 130 Mass. 116.

lieved that the American courts have not departed from the true principle, except in a few cases, loose statements by way of *dicta* not having upset the early established rule that such easements arise by implied reservation on the same principle as by implied grant, the only distinction being that in case of doubt the doubt will be resolved against the grantor, and therefore against implying the easement by reservation in favor of the grantor where the parcel benefited is retained, and in favor of implying the easement by implied grant, as against the grantor, where the parcel benefited is conveyed.⁴

§ 284. Creation of Easements by Prescription.— Under the ancient common law a user of one parcel of land for the benefit of another, continued from time immemorial, or from a “time whereof the memory of man ran not to the contrary,” resulted in the creating of an easement by prescription. As early as 1275 it became established that “legal memory” within this rule extended back to the beginning of the reign of Richard I, or to 1181, so that a user, the beginning of which dated back to that year, gave rise to a prescriptive right. By the statute of Henry III, ch. 8, a limitation was imposed upon actions to recover the possession of land in the adverse possession of another, the action being barred if the possession dated back to the reign of Henry II, a period of seventy years. By 3 Edw. 1, ch. 39 (1275), the period of adverse possession barring the action was fixed from the time of Richard I, a period of eighty-eight years. By the statute 31 Henry VIII, ch. 2, the period of limitation of actions to recover land was fixed at sixty years. The Statute of Limitations, 21 Jas. I, ch. 16 (1623), finally fixed the period of limitation in actions to recover real property at twenty years, which is the present period of limitation in most of the states.⁵ Without the aid of any

4. See last two preceding notes.

McFarlan, 43 N. J. L. 605, the court

5. In *Lehigh Valley R. R. Co. v.* said: “At common law there was no.

statutory provision the courts by analogy to these statutes made the period of prescriptive user required to create an easement the same, for the time being, as was fixed by these statutes as the period of limitation upon actions to recover land in the adverse possession of another.⁶

fixed period of prescription. Rights were acquired by prescription only when the possession or enjoyment was 'time whereof the memory of man ran not to the contrary.' By 20 Henry III, c. 8, the limitation in writs of right dated from the reign of Henry II. By 3 Ed. I, c. 39, the limitation was fixed from the reign of Richard I. By 21 Jac. I, c. 16, the time for bringing possessory actions was limited to twenty years after the right accrued. These statutes applied only to the recovery of land; none of them embraced actions in which the right to an incorporeal hereditament was involved. But by judicial construction an adverse user of an easement for the period mentioned in the statutes, as they were passed from time to time, became evidence of a prescriptive right; and finally, the fiction was invented of a lost grant, presumed from such user to have once been in existence and to have become lost."

See *Angus v. Dalton*, 3 Q. B. Div. 85; 4 Q. B. Div. 162; 6 Ap. Cas. 740; *Tracy v. Atherton*, 36 Vt. 503.

Though in the majority of the states the period of limitation fixed by statute upon actions to recover real property is twenty years, yet in many states a different period is fixed, viz., five, seven, fifteen, and in some states twenty-one years. See statutes in the different states. The period of prescription in each state is the period of limitation so provided for

actions to recover land. See *Atty. Gen. v. Revere Rubber Co.*, 152 Mass. 444; *Ballard v. Demmon*, 156 Mass. 449; *Krier's Road*, 73 Pa. St. 109; *Schulenberg v. Zimmerman*, 86 Minn. 70; *Tracy v. Atherton*, 36 Vt. 503.

6. See preceding note. In *Tracy v. Atherton*, 36 Vt. 503, the court said: "But all authorities concur in saying that this doctrine has been adopted and rests upon its analogy to the statute of limitations applicable to lands. * * * And in our judgment rights to easements acquired by long possession ought to stand on the same ground as rights to possession in lands. The real principle underlying the right is the same precisely on which the statute of limitations stands. In the first place, it is presumed that one man would not quietly submit to have another use and enjoy his property for so great a length of time unless there existed some good reason for his doing so, and that after allowing it for so long, he should not call upon him to show his right or title, when it may not be in his power to do so; and in the second place, it is a rule of policy, adopted in support of long and uninterrupted possession. It is important too in another view, that the doctrine of the law in the two cases should harmonize, that the people may not be misled and perplexed by having the law different ways upon subjects which in reason and upon principle should be the same."

In short, the statutes above referred to fixed the period of adverse possession by which title to land could be acquired, by barring thereafter any action to recover the property. The courts, by analogy to these statutes, established like periods of adverse user at the expiration of which the user became an incorporeal right or easement against the servient estate in favor of the dominant estate.

In this connection the courts made use of the fiction of a lost grant, viz.: it was presumed from the adverse user for a period beyond legal memory, fixed ultimately, after the statute of James I, to twenty years, that the easement had been created in due form between the owners of the two parcels by grant, and that the grant had since been lost. But this presumption could not be rebutted even by the most conclusive proof that no grant had, in fact, been made. It was a mere fiction, used as one court has put it, to avoid the rule of pleading requiring *profert*. "Allegation of the loss of the grant excused *profert* and bringing the instrument into court."⁷ It was a mere fiction "and juries were directed so to find in cases in which no one had the faintest belief that any grant had ever existed, and where the presumption was known to be a mere fiction."⁸

It is now settled generally that upwards of twenty years' adverse user of a sort required to gain a prescriptive right as detailed in the following section, will give rise to the easement by prescription, exactly as adverse possession of land for upwards of twenty years will create an absolute title by adverse possession, the fiction of a lost grant though commonly referred to by the cases as the basis of the rule, being as a practical matter no longer necessary for any purpose.⁹ Indeed, its principal effect seems to have been

7. *Lehigh Valley R. R. Co. v. McFarlan*, 43 N. J. L. 605.

8. By Cockburn, C. J., in *Angus v. Dalton*, 3 Q. B. Div. 85, at 116-118.

9. The presumption of a lost grant arising from twenty years adverse

user is an irrebuttable presumption of law, not a presumption of fact, since it cannot be overthrown by proof, no matter how conclusive, that no grant had ever been made. Thus it became a highly artificial and unnecessarily

to introduce uncertainty and confusion into the law, some courts having been led to treat it as a real presumption, and therefore subject to rebuttal by evidence that no grant had in fact been made.¹⁰

§ 285. Nature of User Required to Create Easements by Prescription.—The user must have been open and notorious, continuous, uninterrupted, undisputed, under claim of right, and adverse in order that the easement shall arise by prescription. Prescription is based on the same theory as adverse possession; as we have seen the entire doctrine has been developed by the courts from the doctrine of adverse possession growing out of the Statute of Limitations.¹ Failure on the part of the owner of the property which is being adversely used for more than twenty years to prevent the user, either by some active physical interruption or by starting an action to restrain it or to recover damages arising therefrom, is the real basis of the easement, just as a similar failure by the record owner to enter or to bring an action to recover his land is the basis of title by adverse possession. It is, therefore, a species of common law limitation created by the courts, of the same nature as the limitation upon actions to recover the possession of land, by which

misleading way of stating the simple result that such user for twenty years gives rise to an easement in favor of the dominant estate as a matter of law, as effectually as though granted. It is, of course, absolutely immaterial whether there ever was such a grant or not. In either case the easement arises. See *Tracy v. Atherton*, 36 Vt. 503, quoted from in note 6, *supra*, and other cases cited in preceding notes, particularly *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. L. 605. See, also, *Webber v. Chapman*, 42 N. H. 326; *Pierce v. Cloud*, 42 Pa. St. 102; *Boyce v. Mis. Pac. R. Co.*, 168

Mo. 583; *Carmody v. Mulrooney*, 87 Wis. 552; *Coolidge v. Larned*, 8 Pick. (Mass.) 503, and *Sargeant v. Ballard*, 9 Pick. 251. In *Ward v. Warren*, 82 N. Y. 265, the court states that the presumption of lost grant arising in such case is conclusive. See, also, *Hey v. Coleman*, 78 App. Div. N. Y. 584, to same effect.

10. *Lamb v. Crosland*, 4 Rich. (S. C.) 536. See dicta in *Parker v. Foote*, 19 Wend. (N. Y.) 309, to the effect that the presumption may be rebutted.

1. See preceding section and notes thereunder.

owners are barred from any remedy for wrongful acts of user after they have been continued uninterruptedly and adversely for upwards of twenty years. By keeping this fundamental principle in mind most of the difficulties met with in the cases are removed.

The user must be open and notorious. If hidden and concealed, so that the owner of the property affected adversely could not reasonably be expected to know of the user, no easement arises irrespective of the duration of the wrongful user. There has been no laches in asserting his right, and therefore no reason for barring his action arising out of the wrongful use made of his land.² The fact that he did not know of the user because of his absence from the country or the like will be immaterial if it was open and notorious so that he ought to have known of it, either directly or through his agent or representative.³

The user must have been continuous for the full period of twenty years or more. No difficulty exists in cases involving easements of drainage, of pipes or aqueducts from springs or reservoirs, or other situations of a like nature in which a constant burden is imposed on the servient estate through the existence of a permanent structure or fixture in connection with the user. But where there is no such permanent appropriation of the estate burdened, only an occasional user, as where a right of way is claimed, the right having been exercised from time to time as occasion therefor might require, the person claiming the easement

2. *Ward v. Warren*, 82 N. Y. 265; *Treadwell v. Inslee*, 120 N. Y. 458; *Cleveland v. Ware*, 98 Mass. 409; *Deerfield v. Conn. Riv. R. Co.*, 144 Mass. 325.

3. *Ward v. Warren*, 82 N. Y. 265; *Lewis v. N. Y. & H. R. Co.*, 162 N. Y. 202; *O'Brien v. Goodrich*, 177 Mass. 32.

A serious change in the character of the user is in effect a new user

which commences as of the time of the change, and twenty years must elapse thereafter to give rise to the easement. *Am. Bank Note Co. v. N. Y. El. R. Co.*, 129 N. Y. 252; *Baldwin v. Calkins*, 10 Wend. (N. Y.) 167; *Homer v. Stilwell*, 35 N. J. L. 307; *Cowell v. Thayer*, 5 Met. (Mass.) 253; *Cotton v. Pocasset Mfg. Co.*, 13 Met. (Mass.) 429.

has the burden of proving that a user similar to the right claimed has been regularly and habitually exercised and enjoyed for the benefit of the dominant estate for the requisite period.⁴ Following the analogy of adverse possession and regarding the user as an incorporeal interest actually claimed and enjoyed by the owner of the dominant estate, a mere failure to make use of the way or other privilege for any short period of time, as for a month, or six months, or a year, would not amount to a break in the twenty years' term of adverse user unless under the circumstances of the case an intention to give up the user is disclosed; just as in the case of adverse possession failure to occupy the premises for a like time would not be a break in the term of adverse possession unless it was long enough to establish an intention to relinquish the possession. Thus where the privilege of piling boards on the servient estate had been exercised adversely from 1822 to 1829, and after a break of five years from 1834 to 1846, the break of five years was held to be so long as to disclose a giving up of the user, and constituted an interruption.⁵ In another case an easement to carry on an offensive trade amounting to a nuisance to adjoining property was held to have arisen by twenty years adverse user, though the business had been suspended during two years, the circumstances of the suspension not having disclosed an intention to abandon the business permanently.⁶ For the same reason the suspension of the flowing of land while the dam which caused the flowage was being repaired was not an interruption.⁷ The principle involved is well illustrated by cases of flowage by means of dams maintained for twenty years. Thus where a dam was maintained at a certain height, but there was water enough in the stream to fill it for only part of each year, the right of

4. See last paragraph preceding (Mass.) 8; criticized in *Carlisle v. Cooper*, 4 C. E. Greene (N. J.) 256, note, also notes following.

5. *Pollard v. Barnes*, 2 Cush. 261.

(Mass.) 191.

7. *Wood v. Kelly*, 30 Me. 47.

6. *Dana v. Valentine*, 5 Met.

flowage was fixed by the height of the dam, though the dam was not full for a considerable part of each year, and the upper land involved was flooded for only part of the time. The mere maintenance of the dam would not have been enough without the flooding of the land above for a sufficient length of time each year to give notice of the right claimed.⁸ In the same way the maintenance of flash-boards on a dam for twenty years in order to maintain the water at a greater height at certain seasons gave the right to continue the flash-boards thereafter, or to carry up the dam by a permanent structure to the same height, provided no greater flowage was caused than existed during the user of twenty years.⁹

The user is therefore continuous if enjoyed as often as may be required for the uses of the dominant estate, and an actual discontinuance of the user for a period of time will not be an interruption which will break the running of the twenty year period unless it is so long continued, or has come about under such circumstances, as to indicate a voluntary giving up of the right of user claimed.¹⁰

The user must have been uninterrupted and undisputed. If the owner of the land burdened by the user interrupts it either by an action for an injunction or to recover damages therefor¹¹ or by obstructing the way or other user, or by preventing its enjoyment by any other means,¹² the inter-

8. *Winnipiseogee Co. v. Young*, 40 N. H. 436; *Gilford v. Winnipiseogee Lake Co.*, 52 N. H. 262.

9. *Cowell v. Thayer*, 5 Met. (Mass.) 253; *Marclay v. Shultz*, 29 N. Y. 346; *Hall v. Augusbury*, 46 N. Y. 622.

10. *Washburn Easements* (4th ed.), 154-168; *Hoag v. Delorme*, 30 Wis. 594, 595; *Carlisle v. Cooper*, 4 C. E. Greene (N. J.) 260. Where the owner of the dominant estate exercises the user adversely for some time, and then secures a license permitting the

user, after the expiration of which he again enjoys the user adversely, the license is an obvious break in the user, as would be the acquiring of the servient estate by the owner of the dominant estate, and the subsequent reconveyance thereof. See *Washburn Easements, supra*, 158.

11. *Eaton v. Swansea Water Wks. Co.*, 17 Q. B. 267; *Workman v. Curran*, 89 Pa. St. 226; *Powell v. Bagg*, 8 Gray (Mass.) 441.

12. *Livett v. Wilson*, 3 Bing. 115;

ruption makes the period of user up to that time count for nothing, and there must be twenty years of continued and uninterrupted user after such interruption has ceased in order to give rise to an easement by prescription. Under the Statute of Limitations an entry by the record owner interrupts the period of adverse possession in the same way, the continuity of possession by the adverse holder being broken for the time, his continued wrongful holding thereafter giving rise to a new right to sue him in ejectment which could not be barred within twenty years. So in the case of a prescriptive user, an assertion of his right on the premises in any form by the owner must be regarded as equivalent to an entry against an adverse holder, an entry as against an incorporeal right being impossible, and he being already in possession of the land. Such assertion of his right in any form on the premises, either by actually blocking the user in a physical way, or by erecting a sign forbidding it, or the like, must be regarded as a taking back of the right of user from the possession of the wrongdoer, so that in continuing the user thereafter he starts a new user which cannot ripen into a right until it has continued for twenty years from that time.¹³ Mere objections to the

Connor v. Sullivan, 30 N. J. Eq. 180; Kimball v. Ladd, 42 Vt. 747; Demuth v. Amweg, 90 Pa. St. 181; Connor v. Sullivan, 40 Conn. 26.

13. In Tracy v. Atherton, 36 Vt. 503, this principle is well expressed: "In the case of lands which are wholly in the possession of a disseisor, in order to make an effectual interruption of the possession, the owner must actually make an entry on the land for that purpose. In Powell v. Bragg, 8 Gray 441, it was decided that where the owner of the land over which another had laid an aqueduct, and claimed to have acquired a right by possession upon the land, forbade

the owner of the aqueduct from entering upon the land to use the aqueduct, this was such an interruption of the use as prevented the acquirement of an easement right. The owner of the land, being already in possession, could not make an entry to stop the effect of the user, or possession, and his act on the land of forbidding the other to enter and use the aqueduct, was all he could do to prevent him, unless he resorted to force, and ordinarily the law does not require one to use force to assert his rights." See, also, cases in last two preceding notes, and notes immediately following.

user by speech or writing, not made on the premises, cannot be regarded as interruptions.¹⁴

The position taken in New Jersey that the interruption must be of such nature as to amount to an actionable wrong in case the right of user turns out to be a legal right, has this to support it, that it makes the act of interruption correspond in that respect with an entry as against an adverse holder.¹⁵ It is submitted, however, that the entry in the latter case, and the act of interruption in the former, break the period of adverse possession or user, not because they might be actionable in the stated contingency, but because they involve the termination of the existing adverse pos-

14. *Angus v. Dalton*, 4 Q. B. Div. 172, 186, *Thesiger, L. J.*, saying that "it is not sufficient to prove such circumstances as negative an actual assent on the part of the servient owner, or even evidence of dissent short of actual interruption or obstruction to the enjoyment." *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. L. 605, the court saying: "Protests and remonstrances by the owner of the servient tenement against the use of the easement, rather add to the strength of the claim of a prescriptive right; for a holding in defiance of such expostulations is demonstrative proof that the enjoyment is under a claim of right, hostile and adverse; and if they be not accompanied by acts amounting to a disturbance of the right in a legal sense, they are no interruptions and obstructions of the enjoyment." See, also, in accord, *Connor v. Sullivan*, 40 Conn. 26; *Demuth v. Amweg*, 90 Pa. St. 181; *Kimball v. Ladd*, 42 Vt. 747.

The ordering of the owner of the aqueduct off the premises by the owner of the servient estate when he entered to repair the aqueduct in

Powell v. Bagg, 8 Gray 441, was regarded by the court in *Lehigh Valley R. Co. v. McFarlan*, *supra*, as such an interference with the enjoyment of the right as would amount to an actionable wrong, had the easement existed as a legal right, which reconciles that case with the other cases here cited.

See *contra*, *Chicago & N. W. R. Co. v. Hoag*, 90 Ill. 339 (when owner protested against the wrongful user and ordered it stopped, held, an interruption).

15. *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. L. 605. The test of whether or not the interference with the easement would amount to an actionable wrong in case the easement were a valid legal right would seem to be sound as such, since there must be at least a momentary taking back of the alleged easement or user in order to constitute an interruption, by analogy to an entry as interrupting the period of adverse possession. It is the interruption, however, not the fact that it is actionable, which breaks the continuity of the adverse user or possession.

session or user as the case may be, which is begun *de novo* by the subsequent user or adverse possession on the part of the wrongdoer.

The appealing to the principle of the presumption of a lost grant as a basis for this rule, any such interruption showing there was no such grant, cannot be too strongly condemned, it being now universally admitted that the doctrine is a mere fiction, and that no such presumption actually exist. It is entirely unnecessary to resort to this fiction, and the continued use of it as a basis for these rules invites confusion and error.

The user must be adverse. If it has been enjoyed under a license, or in consideration of the payment of a sum of money or other thing of value, no easement will arise therefrom no matter how long it may continue.¹⁶ It must be adverse in that it constitutes a wrong for which an action may be brought in order that a prescriptive right may result. Thus the passing of light and air from one parcel through windows in a building situated on an adjoining parcel for twenty years creates no easement of light and air by prescription because no wrong is committed against the owner of the vacant parcel in so maintaining the windows as to receive light and air therefrom. The owner of the building with the windows has merely erected and maintained a building on his own land.¹⁷ The English cases

16. *St. Vincent Asylum v. Troy*, 76 N. Y. 108; *Crouse v. Wemple*, 29 N. Y. 540; *Phillips v. Phillips*, 48 Pa. St. 184; *Pierce v. Cloud*, 42 Pa. St. 113; *Smith v. Miller*, 11 Gray (Mass.) 145; *Dodge v. McClintock*, 47 N. H. 387.

If a license or consent is secured at any time during the period of adverse user, the user is no longer adverse, and will be presumed to continue under the license, until shown affirmatively to have become adverse again. Thus in *Colvin v. Burnet*, 17 Wend. 564, the court said: "It is well

known that a single lip of acknowledgment by a defendant that he claims no title, fastens a character upon his possession which makes it unavailable for ages." See, also, *Watkins v. Peck*, 13 N. H. 360; *Sumner v. Tileston*, 7 Pick. (Mass.) 198.

17. *Parker v. Foote*, 19 Wend. (N. Y.) 309; *Hayden v. Dutcher*, 31 N. J. Eq. 217; *White v. Bradley*, 66 Me. 254; *Rennyson's App.*, 94 Pa. St. 147; *Keats v. Hugo*, 115 Mass. 204; *Randall v. Sanderson*, 111 Mass. 114. See § 286, *post*, and cases cited.

which hold the contrary are opposed alike to the principles of prescription, public policy and good sense.¹⁸ For the same reason the erecting of a building close to the boundary line of two parcels, and the maintenance of it there for twenty years, does not result in an easement of support in favor of such building against the owner of the adjoining land. No wrong of any sort is involved in the erection and maintenance of the building, and to recognize an easement therefrom as arising by prescription is to ignore the fundamental principle upon which prescription depends and to substitute therefor a useless fiction. The mistake in so holding made by the English courts has not generally been followed in the United States, the courts holding that no easement arises in such case because no wrongful user is involved.¹⁹

Knowledge of the wrongdoer that his act is a trespass or other invasion of his neighbor's right is not necessary. Thus if a nuisance is maintained without knowledge that it is a nuisance, or a house is built with eaves projecting over his neighbor's land by one who believed that the house was entirely on his own premises, an easement will nevertheless arise in each case as a result of twenty years' user which was actually adverse.²⁰

User which has been actually adverse for twenty years will be sufficient to create the easement by prescription, though no claim or color of title other than the wrongful

18. See § 286, *post*.

19. *Gilmore v. Driscoll*, 122 Mass. 199 (the court stating (dicta) that no easement should arise by prescription since there is no wrongful user which can be sued for. "The English cases are founded on an analogy to the doctrine of ancient lights, which is not in force in this country"); *Handhan v. McManus*, 100 Mo. 124; *Tunstall v. Christian*, 80 Va. 1; *Sullivan v. Zeiner*, 98 Cal. 346.

In England it is well settled that such easement arises by prescription. *Dalton v. Angus*, 6 App. Cas. 740, 791. There is dicta and a few early decisions in the United States taking the same view. *Lasala v. Hollbrook*, 4 Paige Ch. 169 (dicta); *Aston v. Nolan*, 63 Cal 269; *City of Quincy v. Jones*, 76 Ill. 231.

20. *Grace M. E. Church v. Dobbins*, 153 Pa. St. 294.

user is shown to exist. In fact mere proof of the user for the required period is sufficient, it being presumed to have been adverse in the absence of evidence to the contrary.²¹ But if it appears that it was at any time enjoyed by the express license and consent of the owner of the land which was used, it will be presumed that it continued thereafter under the license, and the period of adverse user will not begin to run until the license has come to an end and the user has become adverse.²²

User under a parol grant of an easement, void under the statute, is adverse, since exercised under a claim of right in the person enjoying the user. The easement is enjoyed as his own by virtue of a grant to him, not as a license subject to be revoked at any time.²³

An easement cannot be gained by prescription against a remainderman or reversioner, during the continuance of a preceding estate for life or years. The obvious reason is that the user, whether a trespass or a nuisance, is a violation of the property rights of the life tenant or the tenant for years, and an easement against them alone can arise through such adverse user. The remainderman or reversioner as the case may be, has no cause of action because of the user, which is in no sense adverse as to him, and therefore the

21. *Carmody v. Mulrooney*, 87 Wis. 552 (the court stating that the burden of proving a license or special contract inconsistent with adverse user is on the owner of the servient estate); *Hammond v. Zehner*, 21 N. Y. 118; *Ward v. Warren*, 82 N. Y. 265; *Parker v. Foote*, 19 Wend. (N. Y.) 309; *Garrett v. Jackson*, 20 Pa. St. 331; *School Dist. v. Lynch*, 33 Conn. 334; *Perrin v. Garfield*, 37 Vt. 304.

22. *Colvin v. Burnet*, 17 Wend. (N. Y.) 564, 568; *Spier v. New Utrecht*, 121 N. Y. 420; *Jewett v. Hussey*, 70 Me. 433; *Arbuckle v. Ward*, 29 Vt.

43. In *Wiseman v. Lucksinger*, 84 N. Y. 31, it appeared that the license to make a drain was for a limited time only, and the adverse use thereof for over twenty years after the license had certainly expired, created an easement by prescription.

23. *Ashley v. Ashley*, 4 Gray (Mass.) 197; *Arbuckle v. Ward*, 29 Vt. 43, 52. See, also, *Wiseman v. Lucksinger*, 84 N. Y. 31, and *Jewett v. Hussey*, 70 Me. 433. This is also by analogy to a similar rule applying to adverse possession under a void parol grant. *Sumner v. Stevens*, 6 Met. (Mass.) 337.

period of enjoyment of the user which elapses during the continuance of the life estate or term of years cannot be counted as part of the term of twenty years' user necessary to give rise to an easement against him.²⁴

If a disability, such as the infancy of the owner of the parcel so used, exists at the beginning of the adverse user, the period of adverse user is extended for a period; generally ten years, after the disability is removed, just as the period of limitation of actions to recover possession of land is extended by the statute, but if the disability arises some time after the user has started it has no effect on the user, which will ripen into an easement on the expiration of twenty years, exactly as though no disability had existed. Here, also, the analogy to the rules governing adverse possession under the Statute of Limitations is followed.²⁵

24. *Daniel v. North*, 11 East 372; *Barker v. Richardson*, 4 B. & Ald. 579; *Wilcox v. Wheeler*, 47 N. H. 488; *Sand v. Church*, 152 N. Y. 174; *Schenley v. Commonwealth*, 36 Pa. St. 29; *Portland v. Keep*, 41 Wis. 490; *Pearsall v. Post*, 20 Wend. (N. Y.) 111.

If a tenancy for years arises after the adverse user has been started, an easement arises by prescription against the landlord through twenty years user, he having leased the premises in that situation. *Cross v. Lewis*, 2 B. & C. 686. See, also, *Reimer v. Stuber*, 20 Pa. St. 458, the court holding that a tenancy from year to year did not prevent an easement from arising by prescription, since the landlord could end the tenancy and resume possession at the end of any year.

In *Lund v. New Bedford*, 121 Mass. 286, vendees were in possession under a contract of purchase, and the plaintiff was a reversioner subject to their tenancy. The court held that he

could recover for the wrongful taking of water through conduits by the defendant, since it would permanently injure his reversion because it would ripen into an easement by adverse user. Assuming the tenancy to be one which the landlord could not terminate as a tenancy at will, this argument begs the question—no such easement could arise, and therefore no permanent damage could be done. As the vendee held as tenant at will, however, the case would seem to be sound.

25. *Tracy v. Atherton*, 36 Vt. 503; *Ballard v. Demmon*, 156 Mass. 449; *Wallace v. Fletcher*, 30 N. H. 434. That the period of any disability existing in the owner for the time being of the servient estate, not only at the beginning but also during the period of adverse user must be deducted from the twenty-year period was held in *Lamb v. Crosland*, 4 Rich (S. C.) 536, the court following the theory of a lost grant. As to the statute of

A user enjoyed by one person, and on his death, by his heir or devisee, or on a conveyance of his estate, by his grantee, will be a continuous user giving rise to an easement after twenty years of such combined enjoyment. The user enjoyed by different persons having no privity with one another as successive owners of the dominant estate will not be combined in this way, as a single period of continuous enjoyment. Each will be taken separately in determining whether or not the prescriptive period has elapsed.²⁶ Here, also the analogy of adverse possession under the Statute of Limitations is followed.²⁷

§ 286. Natural Rights; Easements of Light and Air.—The only easements that exist between adjoining parcels arising by nature out of their relation to one another are easements of support—the mutual right of each parcel to be supported by the other in their natural state,¹ and riparian rights in a stream.² Whether or not easements of light and air and easements in percolating and surface waters exist by natural right has been extensively considered.

No natural legal right to have light and air pass over one parcel to another adjoining parcel exists in any form. If the owner of one piece of land carries on a business which so pollutes the air as to interfere unreasonably with his neighbor's right to possess and enjoy his property he is guilty of maintaining a nuisance and is liable in tort for the damages resulting, and the nuisance may be enjoined in equity if it is one which may be continued indefinitely. But the pollution of the air is a nuisance, not because it interferes with any right in the nature of an easement, but because it amounts to an unreasonable interference

limitations and adverse possession thereunder as affected by disabilities existing at the time the adverse possession started, see § 345, *post*.

²⁶ *Cole v. Bradbury*, 86 Me. 380; *Williams v. Nelson*, 23 Pick. (Mass.)

141; *Leonard v. Leonard*, 7 Allen (Mass.) 277; *Tracy v. Atherton*, 36 Vt. 503.

²⁷ See § 244, *post*.

¹ See § 290, *post*.

² See § 288, *post*.

with the neighbor's right to enjoy his property in a reasonable manner. Interference in an unreasonable way with this right of enjoyment by any other unreasonable use of the adjoining property would be a nuisance for the same reason, though no interference with light and air, as such, existed. These matters are part of the law of torts and require no further consideration here.³

As has already appeared, the passing of light and air for twenty years uninterruptedly from one parcel to windows on a building erected close to the boundary line on the adjoining parcel, creates an easement by prescription in England, giving to the parcel with the building the right to have light and air continue to come in the same way without material obstruction from buildings thereafter erected on the other parcel.⁴ This doctrine cannot be supported on principle, and has been repudiated generally in this country.⁵

In a like case where both parcels belong to one person, who conveys the parcel with the building, retaining the vacant parcel, an easement arises by implied grant in England and in a few states in this country, though the building is not an ancient one.⁶ The rule adopted in the great majority of the states in which the question has arisen is that no easement arises in such case, since there is no user of one

3. *Bliss v. Hall*, 4 Bing. N. C. 183; *Banford v. Turnley*, 3 B. & S. 62; *Campbell v. Seaman*, 63 N. Y. 568; *Rogers v. Elliott*, 146 Mass. 349, 351; *Boston Ferrule Co. v. Hills*, 159 Mass. 147.

The maintenance of a nuisance by which the air is polluted or noise or vibration produced, if persisted in for twenty years, in substantially the same form, doing substantially the same damage, results in an easement by prescription, the owner of the dominant estate acquiring the right

to continue the use of his land constituting the nuisance as though the right had been granted to him by the adjoining owners. *Sturgis v. Bridgman*, 11 Ch. Div. 852; *Dana v. Valentine*, 5 Metc. (Mass.) 8, 14; *Davis v. Sawyer*, 133 Mass. 289; *Rogers v. Elliott*, 146 Mass. 349; *Matthews v. Stillwater Gas, etc. Co.*, 63 Minn. 493, 496.

4. See § 285, *ante*.

5. See § 285, *ante*.

6. See § 281, *ante*.

parcel for the benefit of the other. Certainly there is no such user where the two parcels belong to different persons, and there is no stronger reason existing for finding such user merely because the ownership of both parcels happens to be in the same man. From the standpoint of the average man there is no appropriation of one parcel as vacant property to supply light and air to the other. This matter has already been considered and cases cited in the discussion of easements created by implied grant.⁷

Easements of light and air, restricting the erection of buildings on one parcel so as to cut off light and air from an adjoining parcel, may be created by express grant or reservation in a deed conveying either parcel, either in the form of a grant or reservation, or in the form of a covenant, amounting to the same thing. Such easements depend on the express terms of the instrument creating them, and are subject to the rules governing other easements.⁸

§ 287. Percolating and Surface Waters.—No natural right exists between adjoining owners in waters percolating through the soil. The upper owner may use his land in such way as to prevent the water from percolating to his neighbor's land, using and consuming it for any purpose he pleases, and the lower owner is not compelled to receive such waters. The same rule applies to surface waters other than streams. The mutual rights of owners along the banks of a defined stream will be considered later.⁹ Each of the adjoining owners may improve his land by excavating, grading, sinking shafts in mining operations, sinking wells, and the like, unhampered by any effect of change in the natural flow of percolating or surface waters. The lower owner may by dike or embankment at the line prevent such waters from flowing on his property without incurring any liability.

7. See § 281, *ante*.

Hagerty v. Lee, 45 N. J. Eq. 1, 15;

8. Peck v. Conway, 119 Mass. 546; Weigmann v. Jones, 163 Pa. St. 330.

Ladd v. Boston, 151 Mass. 585; 9. See § 288, *post*.

Any damage resulting to the neighbor in any of these cases is *damnum absque injuria*. The flow of surface or percolating waters not confined to streams is so indefinite, so constantly shifting in amount and direction of flow, that it would be impracticable to apply the rules which determine the mutual rights of owners along the banks of streams.¹⁰

10. As to percolating waters: *Acton v. Blundell*, 12 M. & W. 324; *Chasemore v. Richards*, 7 H. L. C. 349; *Goodale v. Tuttle*, 29 N. Y. 466; *Bloodgood v. Ayers*, 108 N. Y. 400; *Ocean Grove Assn. v. Commrs. Asbury Pk.* 40 N. J. Eq. 447; *Roath v. Driscoll*, 20 Conn. 533; *Chatfield v. Wilson*, 28 Vt. 49, 31 Vt. 358; *Wheatley v. Baugh*, 25 Pa. St. 528; *Haldeman v. Bruckhardt*, 45 Pa. St. 518.

As to surface waters: *Broadbent v. Ramsbotham*, 11 Ex. 602; *Barkley v. Wilcox*, 86 N. Y. 140; *Gannon v. Hargadon*, 10 Allen (Mass.) 106; *Bates v. Smith*, 100 Mass. 181; *Bowlsby v. Speer*, 31 N. J. L. 351; *Chadeayne v. Robinson*, 55 Conn. 345; *Byrne v. Farmington*, 64 Conn. 367; *Schlieter v. Phillipy*, 67 Ind. 201; *Lessard v. Stram*, 62 Wis. 112; *Sanguinetti v. Peck*, 136 Cal. 466; *Cedar Falls v. Hansen*, 104 Iowa 189; *Walker v. So. Pac. R. R. Co.*, 165 U. S. 593, 602.

In some states, however, the rule of the civil law has been followed, viz., that surface water, as between adjoining owners, must be permitted to flow according to the natural formation of the land, so that the lower owner is compelled reasonably to receive surface waters which would naturally flow over his land from his neighbor's, and the upper owner has no right to unreasonably stop such

flow. *Delahoussaye v. Judice*, 13 La. Ann. 587; *Hays v. Hays*, 19 La. 351; *Foley v. Godchaux*, 48 La. Ann. 466; *Lambert v. Alcors*, 144 Ill. 313, 326; *Anderson v. Henderson*, 124 Ill. 164; *Peck v. Herrington*, 109 Ill. 611; *Gillham v. Madison Co. R. R. Co.*, 49 Ill. 484; *Rhoads v. Davidheiser*, 133 Pa. St. 226; *Martin v. Riddle*, 26 Pa. St. 415; *Boyd v. Conklin*, 54 Mich. 583; *Preston v. Hull*, 77 Iowa 309; *Nininger v. Norwood*, 72 Ala. 277; *Mayor of Albany v. Sikes*, 94 the doctrine of unreasonable user to the doctrine of unreasonable user to the injury of the adjoining owners. There is no doubt that slight injury resulting from interferences with, or modifications of the flow of surface water arising in the reasonable use or improvement of his property on the part of any owner, would not give rise to a cause of action in nuisance.

The law is well settled that the taking or cutting off of percolating water which supplies a spring, well or stream in another's land is not a wrong irrespective of the damage which may result, provided it is caused by the act of the owner in the use or improvement of his own land, as appears by the cases above cited. But where such owner sinks a well or the like in his land near the line and as a result water is drawn by percolation from a well, spring or

It must be remembered, however, that each owner must so use his property as not unreasonably to interfere with

stream near by on his neighbor's land, not merely interrupted or taken before reaching the neighbor's well, spring or stream, there is authority for the proposition that the diversion is an actionable wrong, no matter how innocent the action may have been. See discussion (*dicta*) in *Trustees, etc. v. Youmans*, 50 Barb. (N. Y.) 316-329, 45 N. Y. 362; also discussion in *Pixley v. Clark*, 35 N. Y. 528, the court referring to *Dickinson v. Canal Co.*, 7 Exch. 282, as so holding. See, also, *Delhi v. Youmans*, 45 N. Y. 363, and *Chatfield v. Wilson*, 28 Vt. 49, 56.

In *Paine v. Chandler*, 134 N. Y. 385, an easement in a spring and pipe leading therefrom having arisen in favor of an adjoining farm by implied grant, the court held that the digging of a well a few feet from the spring and the digging of a ditch therefrom parallel with the pipe, with the result that the water in the spring was so lowered as to stop its flow through the pipe, was a wrongful diversion of the water from the spring. It does not appear whether or not the water was abstracted from the spring by percolation, or whether it was intercepted before it reached the spring. As the Court of Appeals had previously decided that an *interception* of the water in such case before reaching the spring would not be a violation of the easement (*Bliss v. Greeley*, 45 N. Y. 671), it is fair to assume that the case was decided on the theory that the well and ditch were unlawful in that they caused water to flow from the spring by percolation. See, also, *Grand Junc.*

Canal Co. v. Shugar, L. R., 6 Ch. App. 483, 488.

See opinion of Balcom, J., in *Trustees, etc. v. Youmans*, 50 Barb. (N. Y.) 316, which argues against this doctrine, it being impossible for such owner in excavating or digging in his own land to know what the effect by way of percolation from springs or streams on his neighbor's land might be. Certainly there is no *burden* by way of *easement* imposed on adjoining land which requires that it be maintained as an embankment to prevent percolation in such case. The true principle would seem to be that of nuisance arising out of unreasonable user. Where the well or ditch is sunk for the purpose of causing such percolation, in order to get water from the spring or stream, which was the case in *Paine v. Chandler*, *supra*, it would be clearly unreasonable and therefore a nuisance, interfering *unreasonably* with the neighbor's right to use and enjoy his spring or stream. But where such percolation is brought about in digging a cellar or opening a mine or quarry, in the reasonable enjoyment of the owner's land, without malice or intent to injure, and which could not reasonably be foreseen or prevented, it is difficult to understand on what theory liability therefor can be held to exist. Malice would be material only in determining the unreasonableness of the act complained of.

Liability for polluting or poisoning water percolating to a neighbor's land is based on the same doctrine of unreasonable user, *sic utere tuo*, etc.

his neighbor's right to enjoy his property in a reasonable manner. The absolute right of control and dominion which each owner has over his land is always subject to this rule, which aims to secure to each the fullest rights of enjoyment. This necessarily requires that each be protected in his enjoyment of his property from unreasonable acts of interference on the part of his neighbors in the enjoyment of their property. The improving of one's property by grading, excavating and building, sinking mines or wells, and the like, is a reasonable exercise of ownership, permitted to each and every owner, irrespective of comparatively slight damage which may result to his neighbors through interference with the flow of surface or percolating waters, had the land been left in its natural state.¹ But where one owner with wet and swampy land, ditches it so that the water is collected and thrown across the line on his neighbor's land in unusual quantities, making it wet and swampy in turn, in effect transferring the swamp from his own land to his neighbor's, the act is clearly unreasonable, and therefore constitutes a nuisance. It is a violation of the balance of reasonable users required by the law. There is, of course, no violation of any easement in such case, since no easement exists. It is rather, a nuisance, a tort, to be dealt with under the law of torts rather than of property.²

Haugh's Appeal, 102 Pa. St. 42; Collins v. Chartiers Gas Co., 139 Pa. St. 111; Brown v. Illins, 27 Conn. 84, 93.

Where a stranger commits the wrongful act of intercepting percolating water which supplies a stream or spring as source of a stream, owners of the spring or land along the stream may hold him for damages resulting. His act is a wrong—a trespass to the owner of the land on which it is committed, the result of which is injury to the lower riparian owners. It is an actual interference with the stream not justified by rea-

sonable user of the upper parcel, and therefore a nuisance. Parker v. B. & M. R. Co., 3 Cush. 107, 114; Wheatley v. Baugh, 25 Pa. St. 528, 533.

In Minnesota no recovery can be had for any interference with natural conditions of surface or percolating waters provided it results from a reasonable use of the land involved. Sheehan v. Flynn, 59 Minn. 436.

1. See preceding note.

2. Miller v. Laubach, 47 Pa. St. 154; Kelly v. Dunning, 39 N. J. Eq. 482; Bedell v. Village of Sea Cliff,

Where a municipal corporation sinks many wells in land acquired for that purpose, and by pumping great quantities of water therefrom so lowers the water table in the neighborhood as to dry up streams and springs and to render land in the neighborhood dry and less valuable for growing crops, the damage so resulting to owners of adjoining land may be recovered, because the taking and vending of the water in such quantities is an unreasonable user of the land in which the wells have been sunk, unreasonably interfering with the adjoining owner's right of enjoyment. These actions have been maintained, therefore, on the theory that the use of the land by the city constitutes a nuisance to adjoining owners.³ It has been suggested in one case that the working of powerful pumps in these wells, drawing

18 App. Div. (N. Y.) 261; Noonan v. City of Albany, 79 N. Y. 475. The right to drain into streams is discussed under Water Courses, § 288, *post*. The existence of drains constituting a nuisance for upwards of twenty years will result in an easement by prescription as in other cases of nuisance arising from wrongful adverse user. See note 3, *supra*.

The right to drain one's land is limited only by this rule, that it will not be permitted if it constitutes a nuisance to a neighbor, and the courts generally hold that it is an actionable wrong to collect surface-water by artificial ditches and to throw it in large and unusual quantities over the line on one's neighbor's property. It is clear that since no natural easement exists as to such waters, the making of such ditches is not a violation of any right other than the general right arising out of the duty to so use your land as not unreasonably to interfere with your neighbor's enjoyment of his land.

Livingston v. McDonald, 21 Iowa 160; Taney v. Jasper, 39 Ill. 54; Adams v. Walker, 34 Conn. 466; Templeton v. Voshue, 72 Ind. 134.

The N. Y. Constitution, Art. I. § 7, provides that "general laws may be passed permitting the owners or occupants of agricultural lands to construct and maintain, for the drainage thereof, necessary drains, ditches and dykes upon the land of others." Of course compensation must be made to the adjoining owner in such case. Before this provision was introduced in 1894, a drainage act with the same general purpose was held unconstitutional as taking private property for a private purpose. *People v. Henion*, 64 Hun (N. Y.) 471. See *Matter of Tuthill*, 163 N. Y. 133.

3. *Forbell v. New York*, 164 N. Y. 522; *Smith v. City of Brooklyn*, 18 App. Div. (N. Y.) 340; *Reisert v. New York*, 174 N. Y. 196; *Katz v. Walkinshaw*, 141 Cal. 116; *Meeker v. East Orange*, 77 N. J. L. 623.

water from the adjoining property, constitutes a trespass,⁴ but this view can hardly be sustained. The pumping of the water does not apply a force in the form of suction which draws water from adjoining property, but water flows into the wells from the land in the neighborhood by force of gravity as the water in the wells is lowered by action of the pumps. This result is undoubtedly accomplished in most cases where a well is sunk near adjoining property, yet it has never been suggested that the sinking of such well and the operating of a pump therein amounts to a trespass. It is the excessive pumping of water from many wells within a small parcel of land that results in lowering the level of the water table and causes the damage in these cases, and it is this unreasonably excessive user with its attendant unreasonable results upon adjoining owners that give rise to the action. These cases come squarely within the principles of the law of nuisance arising from unreasonable user.

The fact that the water is not used on the premises but is distributed and sold to the people of the city is not conclusive as establishing unreasonableness of user. If the same damage were accomplished by pumping the water and using it up on the premises it would nevertheless be a nuisance, since a use of water having such effect on adjoining property would clearly be an unreasonable interference with the right of enjoyment of adjoining owners.

4. *Forbell v. New York*, 164 N. Y. 522.

The motive with which the water is taken is immaterial. The taking of the water is either lawful, or unlawful, constituting a nuisance. Malice or lack of it would not in either case modify in any way the legal quality and result of the act. See cases in preceding notes, also *Bradford v. Pickles*, App. Cas. 587 (1895); *Phelps v. Nowlen*, 72 N. Y. 39; *Paine v.*

Chandler, 134 N. Y. 385; *Walker v. Cronin*, 107 Mass. 555, 564.

It is submitted that malice should be held to be material in these cases heretofore referred to where water is abstracted by percolation from a spring or stream, in determining whether or not the excavation is in the reasonable enjoyment of the owner's property, or merely for the purpose of wrongfully abstracting water from the spring or stream in question. See note 10, *supra*.

The same general principles apply to percolating oil and natural gas as apply to percolating water, no easement arising by natural right as between adjoining owners, each having the right to take oil or gas from his land, though in so doing he take away oil or gas from his neighbor's well.⁵

§ 288. Streams and Water Courses.—To constitute a stream there must be a regular flow of water in a well-defined channel with banks. Water from a spring flowing in mere rivulets along the surface, without a channel or well-defined course, is surface water and no easement by natural right arises therein between adjoining owners.¹ Where surface waters flow occasionally at times of heavy rains or melting snows in the form of a stream through a natural depression, but at other times no water flows through the depression and no permanent well-defined channel exists, the situation is governed by the rules of law applying to surface water rather than to streams.²

5. *Kelley v. Ohio Oil Co.*, 57 Oh. St. 317; *Peoples' Gas Co. v. Tyner*, 131 Ind. 277; *Westmorland Gas Co. v. De Witt*, 130 Pa. St. 235; *Wagner v. Mallory*, 169 N. Y. 501, 505.

1. *Bloodgood v. Ayers*, 108 N. Y. 400; *Ashley v. Wolcott*, 11 Cush. (Mass.) 192.

2. *Bowlsby v. Spear*, 31 N. J. L. 351; *Barclay v. Wilcox*, 86 N. Y. 140; *Morrison v. Bucksport*, 67 Me. 353; *Gibbs v. Williams*, 25 Kan. 214.

In *Luther v. Winnisimmet Co.*, 9 Cush. (Mass.) 171, 174, the court said: "To constitute a water course the size of the stream is not important; it might be very small, and the flow of the water need not be constant. But it must be something more than a mere surface drainage over the entire face of a tract of land, occasioned

by unusual freshets or other extraordinary causes."

In *Kauffman v. Griesemer*, 26 Pa. St. 407, a flow of water from springs was held to be a stream, though at times there was no flow, the court stating that "the accustomed, though not continuous, flowage of waters is a stream in the eye of the law, and its channel is no more to be obstructed than if it was the channel of a stream that never failed."

Where the flow from a spring is in the form of a defined stream, but for some distance the stream as such is lost in a marsh, the waters again collecting in a stream beyond the marsh, it is a stream throughout, governed by the rules of law applying to streams. The interruption in the stream does not change its char-

A stream is a gift of nature to each owner of land along its banks. Since each has the right to enjoy the stream for every reasonable use and purpose, it follows that no single riparian owner will be allowed to make such use of it as will interfere with the reasonable right of user to which all the others are entitled. It may be used, therefore, by each owner for domestic purposes, the watering of cattle, irrigating the soil, supplying power to run machinery, maintaining artificial lakes or pools, or for any other purpose, provided the user does not result in any material reduction in the size and flow of the stream, or any substantial pollution of its waters.³ No matter how reasonable or laudable

acter. The stream exists clearly enough in its entirety, with mutual rights thereto in the riparian owners. *Gillett v. Johnson*, 30 Conn. 180; *Macomber v. Godfrey*, 108 Mass. 220.

3. *Embrey v. Owen*, 6 Exch. 353; *Pitts v. Lancaster Mills*, 13 Met. (Mass.) 156; *Elliot v. Fitchburg R. Co.*, 10 Cush. (Mass.) 191; *McCormick v. Horan*, 81 N. Y. 86; *N. Y. Rubber Co. v. Rothery*, 132 N. Y. 293; *Pierson v. Speyer*, 178 N. Y. 270; *Higgins v. Flemmington Water Co.*, 36 N. J. Eq. 538; *Coldwell v. Sanderson*, 69 Wis. 52, 57; *Gehlen v. Knorr*, 101 Iowa 700.

In *Miner v. Gilmour*, Moore, P. C. 131, 156, the court said: "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any pur-

pose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury."

In so far as the water is needed for ordinary domestic purposes, drinking, washing, and the like, and the watering of domestic animals, the stream may be used to extinction if necessary. In addition to preceding case, see statements to that effect in *Pierson v. Speyer*, 178 N. Y. 270; *Evans v. Merriweather*, 3 Scamm. (Ill.) 492; *Dumont v. Kellogg*, 29 Mich. 420; *Ferrea v. Knipe*, 28 Cal. 343; *Tolle v. Correth*, 31 Tex. 375; *Washburn Easements* (4th ed.), 330-332.

In *Pitts v. Lancaster Mills*, 13 Met. (Mass.) 156, Shaw, C. J., said: "Every proprietor of land, through

the purpose of the user may be, if it substantially and materially diminishes the flow of the stream, making it a smaller stream than it otherwise would be, the rights of the lower riparian owners are violated, because if many others should use the stream in the same way and for the same purpose it might be so reduced in size as to destroy its value to the rest. The stream as it exists naturally must be maintained for the benefit of all its riparian owners, which would not be the case should any one of them be permitted to reduce its volume in any substantial or appreciable way.⁴

For exactly the same reason any substantial pollution of the stream is a violation of the easement existing in favor of each lower proprietor against every upper proprietor. If the stream should be polluted by many others in the same

which a current of water flows, has a right to the use of it on his own land, amongst other things for mill purposes, making such reasonable use of it, and of the mill power furnished by it, as he can make consistently with a like reasonable use by other proprietors, above and below, through whose land it passes. What is a reasonable use must depend on circumstances, such as the width and depth of the bed, the volume of water, the fall, previous usage, and the state of improvement in manufactories and the useful arts. 8 Met. 476."

In *Pierson v. Speyer*, 178 N. Y. 270, the court said: "A riparian owner is entitled to a reasonable use of the water flowing in a natural stream over his premises. He may use it for domestic purposes both in his house and his barn, and may consume it for the support of his horses, his cattle and his poultry. He may temporarily detain it by dams, in order to furnish power to run machinery and for the

purpose of irrigation of his lands when the amount used is reasonable and is not out of proportion to the size of the stream. He may also construct ornamental ponds and store them with fish, or use them for his geese, his ducks or his swans, so long as the size of the ponds are not so large as to materially diminish, by evaporation and absorption, the quantity of water usually flowing in the stream."

In *Wheatley v. Chrisman*, 24 Pa. St. 298, 302, the court said: "The necessities of one man's business cannot be the standard of another's rights in a thing which belongs to both. * * * The defendant had a right to such use as he could make of the water without materially diminishing it in quantity or corrupting it in quality. If he needed more he was bound to buy it. However laudable his enterprise may be, he cannot carry it on at the expense of his neighbor."

4. See preceding note.

way it would be rendered entirely unfit for use by the remaining owners.⁵

5. *Snow v. Parsons*, 28 Vt. 459, the court holding that evidence tending to prove that it was the universal custom of tanneries to deposit waste tan bark in streams on which they were situated, and that this practice was essential to their operation with a profit should have been admitted in determining whether or not there was an unreasonable pollution of the stream, interfering unreasonably with the plaintiff's use of the stream below. Lower proprietors must submit to some pollution, provided it does not unreasonably interfere with their enjoyment of the stream, and is necessary to the beneficial enjoyment thereof by others. See, also, to same effect as to custom, *Dumont v. Kellogg*, 29 Mich. 420. Evidence of custom was excluded in *Hayes v. Waldron*, 44 N. H. 580, and *Timm v. Bear*, 29 Wis. 254.

The depositing of sawdust in a stream is governed by the same rule of reasonable user. *Prentice v. Geiger*, 74 N. Y. 341; *Canfield v. Andrew*, 54 Vt. 1; *Green v. Gilbert*, 60 N. H. 144.

In *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. St. 126, the court held that a mine owner could drain his mine by pumping into a stream which was the natural drainage of the land where the mine was situated, though it rendered the stream unfit for domestic uses. In later cases in Pennsylvania the doctrine of this case has been strictly limited. After referring to this case the court in *Strobel v. Kerr Salt Wks.*, 164 N. Y. 303, said in refusing to apply the same rule to a pollution of a stream

in a similar way with salt so that cattle would not drink it, etc.: "The extensive coal mines of the state of Pennsylvania were regarded as of sufficient importance to warrant the court in departing from the law as previously laid down by itself in the same case, as well as from the rule which prevails in England and in this country, except in some of the states where mining is extensively carried on and there is no way to get rid of the water in the mines except by pumping it into the streams (*Clifton Iron Co. v. Dye*, 87 Ala. 470). Courts of the highest standing have refused to follow the *Sanderson* case. (*Colonies, etc. Co. v. Tucker*, 48 Oh. St. 41; *Beach v. Sterling Iron & Zinc Co.*, 54 N. J. Eq. 65; *Young v. Bankier Dist. Co.*, L. R. [App. Cas. 1893] 691), and its doctrine was finally limited by the court which announced it. (*Robb v. Carnegie*, 145 Pa. St. 338.) * * * We have never adopted that rule in this state, and no public necessity exists therefor, even if it would ever warrant the courts in relaxing rules for the protection of property of small value in the interests of some business required to develop the resources of the state, and in which much capital had embarked, giving employment to a great number of people."

So same effect, *Drake v. Lady Eusley Coal Co.*, 102 Ala. 501. See, also, *Pfeiffer v. Brown*, 165 Pa. St. 267; *Hindson v. Markle*, 171 Pa. St. 138; *Beach v. Sterling Iron Co.*, 54 N. J. Eq. 65, 76.

Use of property by the owner in the ordinary way, as for pasture,

The question of whether the user of the stream is, *per se*, a reasonable one has been sometimes discussed by the courts. It has been said that the taking of water from the stream to sell it to a railroad company or to any person not a riparian owner is unreasonable and will not be allowed.⁶ The better and prevailing view is that such user is not, of itself, a violation of the rights of lower owners, it being unreasonable and therefore illegal only in those cases in which the stream is diminished in flow to any material extent. If the same stream continues to flow to the lower proprietors substantially unchanged in flow, they are not damaged and no right of theirs is violated.⁷

It is not necessary that the lower owner prove any damage through interference with a use of the stream which he is actually enjoying. It is sufficient to show that the user complained of will interfere with some reasonable use of the stream to which the lower owner may desire to put it in the future. He may assert his right by recovering nominal

plowing, etc., cannot be interfered with merely because some pollution of the stream occurs, as from cows in the pasture, wash from plowed land near the stream, etc. *Helfrich v. Catonsville Water Co.*, 74 Md. 269.

6. *Garwood v. N. Y. Central, etc. R. Co.*, 83 N. Y. 400. The court found as a fact, however, that the vending of the water to the railroad company, not a riparian owner, for the use of its locomotives, was a sufficient diversion "to perceptibly reduce the volume of water therein" and to "materially reduce or diminish the grinding power of plaintiff's mill." The case was correctly decided on the ground of unreasonable diversion and use of water from the stream.

7. *Elliot v. Fitchburg R. R. Co.*, 10 Cush. (Mass.) 191. The fact that the water is not used on riparian land,

but is sold and used elsewhere, is a material fact to be considered in determining whether or not the user is reasonable. A slight interference with the right of user of a lower owner accomplished in this way would be clearly unreasonable, while a similar interference resulting from a use of the water for the purposes of power, irrigation, or the like, on the premises, might not be unreasonable. Any perceptible diminution in the flow of the stream caused by a vending of the water renders such user unreasonable, since it could not be enjoyed by all, or nearly all, without seriously impairing or destroying the stream. See *Clark v. Pa. R. R. Co.*, 145 Pa. St. 438; *Pa. R. R. Co. v. Miller*, 112 Pa. St. 34, 42; *Higgins v. Flemington Water Co.*, 36 N. J. Eq. 538.

damages and thus prevent an easement by prescription from arising which would legalize the unlawful user of which he complains, or he may secure an injunction restraining it.⁸

The setting back of water by a lower owner upon land of an upper owner is, of course, an unreasonable user of the stream. Such a user, persisted in for upwards of twenty years, becomes an easement by prescription.⁹

8. *Elliot v. Fitchburg R. Co.*, 10 Cush. (Mass.) 191; *N. Y. Rubber Co. v. Rothery*, 132 N. Y. 293, and cases therein cited; *Watson v. New Milford Water Co.*, 71 Conn. 442, 450; *Messinger's Appeal*, 109 Pa. St. 285. It is not correct to say that no action arises until the lower owner is actually damaged through interference with a use to which he subsequently puts the stream, and therefore that the period of prescriptive user does not start until then. A user which prevents a lawful user by the lower proprietor is a present interference with a valuable property right, and a continuation thereof for upwards of twenty years unquestionably ripens into an easement by prescription under the cases.

9. *Hart v. Vose*, 19 Wend. (N. Y.) 365; *Townsend v. McDonald*, 14 Barb. (N. Y.) 460, 467; *Wells v. Garburr*, 132 N. Y. 430 (such easement arising by implied grant); *Bangor v. Lansil*, 51 Me. 526; *Lincoln v. Chadbourn*, 56 Me. 197; *Graver v. Scholl*, 42 Pa. St. 67.

Whether the setting back of water so as to increase the depth of the stream, but without overflowing its banks, on the land of an upper proprietor gives an action for nominal damages, no actual or possible damage being shown, is a question about

which the cases are in conflict. That such action can be maintained has been held in several cases. *Hendrick v. Cook*, 4 Ga. 241, 257, 265; *Ripka v. Sergeant*, 7 Watts & S. 9, 13; *Company v. Goodale*, 46 N. H. 56; *Graver v. Scholl*, 42 Pa. St. 67. Cases taking the position that actual or prospective damage must be shown; that such user of the stream is reasonable if it does not in any perceptible way interfere with a present or prospective reasonable right of user on the part of the upper proprietor, would seem to be more consistent with the general principle of mutual rights of riparian owners in streams. A lower proprietor has no action for an interference with the natural flow which is reasonable and does not interfere with a reasonable use of the stream by him. Why shouldn't an upper owner be governed by the same rule in the case of a set-back which covers no additional land, and which in no way interferes with any reasonable use of the stream? *Waring v. Martin*, Wright 381; *Garrett v. McKie*, 1 Rich. (S. C.) 444; *Chalk v. McAlilly*, 11 Rich. 153, 161; *Thompson v. Crocker*, 9 Pick. (Mass.) 59; *Shierr v. Voorhees*, 2 Green Ch. (N. J.) 25; *Pixley v. Clark*, 35 N. Y. 525. It is clear that the user would be unreasonable if it would tend to interfere

Each riparian owner has a natural right to drain his land into the stream, limited to land which has its natural drainage into the stream, and limited further by the capacity of the stream. Drainage which will cause a stream to overflow its banks, and the turning of other streams from their natural course into the stream in question, or the draining of land into the stream which would naturally drain in another direction will be in each case an unreasonable user. Subject to these limitations the lower owner must receive the stream as it may be after land above him has been drained into it, and will be liable in case he closes it up or otherwise prevents its flow.¹⁰ We have already seen that coal mines, salt works, and the like, cannot be drained into streams contiguous thereto if the result will be a pollution of the water unreasonably interfering with the rights of enjoyment of lower riparian owners.¹¹

Where a stranger is given a right by way of easement to take water from the stream, and to maintain a pipe or canal for the purpose, it has been held that he can maintain no action against an upper riparian owner for an unreasonable diversion or pollution of the stream, the reason being that as he is not a riparian owner the upper owners owe him no duty and therefore incur no liability in such case.¹² The

with a power site belonging to the upper owner. and in such case it would be immaterial whether a mill had been erected on the upper parcel or not. *Stout v. McAdams*, 2 Scamm. (Ill.) 67. See *Washburn Easements* (4th ed.), 372-374.

10. *McCormick v. Horan*, 81 N. Y. 86; *Waffle v. N. Y. Cent. R. Co.*, 53 N. Y. 11; *Merrit v. Parker*, 1 N. J. 460; *Tillotson v. Smith*, 32 N. H. 90; *Mayor, etc. v. Appold*, 42 Md. 442; *Miller v. Lauback*, 47 Pa. St. 154.

11. See note 5, *supra*.

12. *Stockport Waterworks Co. v. Potter*, 3 H. & C. 300, approved in

Ormerod v. Todmorden Mill Co., 11 Q. B. Div. 155.

Bramwell, B., said, in a dissenting opinion: "Further, it does seem strange that if a man has an estate on the bank of a stream extending a mile from it, he may build houses on the land, conduct water from the stream to them, and maintain an action and recover substantial damages for the injury to each house; that his tenants of each, if he let them, might do the same even though he demised them for 1000 years at a pepper-corn rent, but that if he grant away the house in fee with the right of water,

better view, more generally taken, is that he may maintain an action for the damages which he sustains. He has an undoubted proprietary right of user in the water. That right is impaired by the wrongful act of the upper owner. It is therefore a nuisance, an unlawful interference with an incorporeal property right.¹⁸

§ 289. Riparian Rights in Tidal Waters and Navigable Streams.—Ownership of land abutting on tidal and other public waters extends to high water mark. The land under water belongs to the state in which it is situated.¹ The riparian owner, however, has the right of access to the water as a public highway, and the right to erect and maintain a landing, wharf or pier for his own use or for the use of the public, subject to rules and regulations made by statute for the protection of the public in the use of the stream or body of water as a public highway.² If he is deprived of this right by the taking of his shore front property under the power of eminent domain, for the uses of a railroad, or for any other public use, he must be compensated, not only for the land, but for these water rights of which he is deprived by cutting off his remaining property from the shore.³

such grantee can maintain no action.
* * * Further, suppose the person fouling the water was not a riparian proprietor, but a mere wrongdoer, why should not an action lie against him? I can see no reason, nor can I see that his being such proprietor makes any difference."

13. *St. Anthony, etc. Co. v. Minneapolis*, 41 Minn. 270; *Bristol Hydraulic Co. v. Boyer*, 67 Ind. 236; *Gillis v. Chase*, 67 N. H. 161; *Winchell v. Clark*, 68 Mich. 64, 73.

See dissenting opinion of Bramwell, B., in *Stockport Waterworks Co. v. Potter*, 3 C. & H. 300, quoted from in preceding note. As stated by the court in *St. Anthony, etc. Co. v. Min-*

neapolis, 41 Minn. 270, 273, it is immaterial whether the water rights interfered with are called riparian or are conventional, arising out of express grant. In either case the rights exist and an unlawful interference with them will give to their owner a right of action.

1. See §§ 311, 320, *post*.

2. *Rumsey v. N. Y. & N. Eng. R. Co.*, 133 N. Y. 79; *Matter of City of New York*, 168 N. Y. 134; *Yates v. Milwaukee*, 10 Wall. (U. S.) 497; *St. Louis v. Rutz*, 138 U. S. 246; *Wall v. Pittsburgh Harbor Co.*, 152 Pa. St. 427, and cases in note following.

3. *Rumsey v. N. Y. & N. Eng. R.*

Statutes generally provide for the granting by the state of land under water to the owner of the upland adjoining the land so granted, the state reserving the right to make laws for the improvement and control of navigation and for the protection of the rights of the public in the streams as highways.⁴ Such grants are always subject to the right of the federal government to make rules and regulations affecting commerce and to act for the improvement of navigation. A grant of land under water to one who is not the owner of the corresponding upland is absolutely void.⁵

§ 290. Easements of Support.—Another easement existing by natural right is the mutual right of every owner to have his land supported in its natural state by the adjoining land of his neighbor. An excavation on either parcel resulting in the caving in or settling of the other, is a viola-

Co., 133 N. Y. 79 (overruling *Gould v. Hudson R. R. Co.*, 6 N. Y. 522); *Buccleuch v. Metrop. Bd. of Wks.*, L. R. (5 E. & I. App.) 418; *Ashby v. Eastern R. Co.*, 5 Met. (Mass.) 368; *Steam Engine Co. v. Steamship Co.*, 12 R. I. 348; *Holton v. Milwaukee*, 31 Wis. 38; *Brisbane v. St. Paul, etc. Co.*, 23 Minn. 114; *Yates v. Milwaukee*, 10 Wall. (U. S.) 497.

In New Jersey, following the *Gould* case, *supra*, since overruled as above stated, the court held that the riparian owner had no remedy. *Stevens v. Patterson & Newark R. Co.*, 34 N. J. L. 532. This case was also decided on the authority of *Buceleach v. Metr. Bd. of Works*, L. R., 5 Exch. 221, since overruled by the House of Lords. L. R., 5 E. & I. App. 418. Since the decision is clearly wrong on principle, and the two cases on which the decision was based have been since overruled in their respect-

ive jurisdictions, it is doubtful if this case will be followed in New Jersey.

These riparian rights are, of course, subject to the right of the State or nation to enact laws in reasonable regulation of navigation for the protection of the public. *Lansing v. Smith*, 8 Cowen (N. Y.) 146, 4 Wend. 9; *Scranton v. Wheeler*, 179 U. S. 141. See *Slingerland v. Inter. Constr. Co.*, 169 N. Y. 60, the court stating that if permanent injury to the riparian owner's right of approach was clearly shown, as a result of the public improvement, damages could be recovered.

4. N. Y. Pub. Land L.; Laws of 1894, ch. 317, as amd. Laws of 1895, ch. 208, § 20, now §§ 75 and 76, Consolidated Laws; *Illinois Cent. R. Co. v. Illinois*, 146 N. Y. 387. See statutes in the different states.

5. N. Y. Pub. Land L., *supra* (Consolidated Laws) § 75.

tion of this easement, giving an action for the damages resulting to the parcel affected in its natural state.¹ If the caving in or settling is caused by the weight of a building or other improvements on the adjoining property there is no violation of the easement and no recovery can be had, the burden imposed on each parcel being limited to the support of the adjoining parcel in its natural condition, without the pressure by buildings.² If the excavation be such that the caving in or settling of the adjoining land would have resulted in any event, though no building had been erected on it, an action will lie for the damage to the land in its natural state, excluding damage to buildings or improvements.³ This exclusion of damages from injuries to buildings is an exception to the general rule that all the damages proximately resulting from a wrongful act may be recovered. But it is argued that the mutual burden is limited to the support of the land in its natural condition, and to give damages for injuries to improvements on adjoining property in such case would be to increase the burden. This is true only in this respect, that the damages

1. *Laaala v. Holbrook*, 4 Paige Ch. Rep. (N. Y.) 169; *Ferrand v. Marshall*, 19 Barb. (N. Y.) 380; *Riley v. Continuous Rail, etc. Co.*, 110 App. Div. (N. Y.) 787; *Booth v. R. W., etc. Co.*, 140 N. Y. 267; *Dalton v. Angus*, 6 App. Cas 740; *Gilmore v. Driscoll*, 122 Mass. 199; *Moellering v. Evans*, 121 Ind. 195; *Sharpless v. Boldt*, 218 Pa. St. 372; *Gildersleeve v. Hammond*, 109 Mich. 431, and cases in notes following.

Some appreciable damage must result. The act of excavating on one's own land is legal, and the mere settling of his neighbor's land as a result, without causing appreciable damage, gives no cause of action. *Smith v. Thackerah*, L. R., 1 Com. Pl. 564.

2. See cases in preceding note: also *White v. Nassau Trust Co.*, 168 N. Y. 149; *White v. Dresser*, 135 Mass. 150; *Wier's Appeal*, 81 Pa. St. 203; *McGettigan v. Potts*, 149 Pa. St. 155; *Buskirk v. Strickland*, 47 Mich. 389; *Gildersleeve v. Hammond*, 109 Mich. 408; *Quincy v. Jones*, 76 Ill. 231; *Shafer v. Wilson*, 44 Md. 268.

3. *Smith v. Thackerah*, L. R., 1 Com. Pl. 564; *Gilmore v. Driscoll*, 122 Mass. 199, following *Thurston v. Hancock*, 12 Mass. 220, and *Foley v. Wyeth*, 2 Allen 131; *McGettigan v. Potts*, 149 Pa. St. 155; *Lee White v. Nassau Trust Co.*, 168 N. Y. 149; *Quincy v. Jones*, 76 Ill. 231; *Gildersleeve v. Hammond*, 109 Mich. 431; *Moellering v. Evans*, 121 Ind. 195.

recoverable in case of an unlawful excavation are increased in amount. The actual burden of support remains the same. Each owner in erecting buildings has the right to believe that the natural support theretofore existing will be maintained, and there is no valid reason why he should not recover his entire damages to land and buildings in case this natural support is taken away.⁴

It is frequently said that the right of mutual support, here discussed, and the rights of riparian owners in streams, are not properly easements at all, it being assumed that an easement must arise by grant or its equivalent, and cannot arise by natural right. The courts generally treat these rights as easements and refer to them as such. Apart from the way in which they arise they are in every respect like conventional easements created by grant. They are in each case an incorporeal right in a servient estate for the benefit of a dominant estate. That they arise by virtue of natural facts rather than by deed does not in any way change their character as incorporeal rights after they come into existence. Though the term applied to them is of no great importance, their nature being understood, as a matter of clear arrangement and terminology it would seem wisest to refer to them as easements arising by natural right.⁵

4. *Dodd v. Holme*, 1 Adal. & E. 493; *Brown v. Robins*, 4 H. & N. 186, *Martin, J.*, saying: "There was ample evidence that the defendant knew the state of the plaintiff's land. There is no ground for reducing the damages. The house was lawfully on the plaintiff's land and was damaged by the unlawful act of the defendant." The jury had found as a fact that plaintiff's land would have settled though no house had been erected on it, and recovery for damage to the house was allowed. To same effect, *Hunt v. Peake*, H. R. V. Johns. 705; *Stojan v. Knowles*, 6 H. & N. 454;

Wilms v. Jess, 94 Ill. 464; *Stearns v. Richmond*, 88 Va. 992. See *Gildersleeve v. Hammond*, 109 Mich. 431; *Shultz v. Bower*, 64 Minn. 123; *Riley v. Continuous Rail Joint Co.*, 110 App. Div. (N. Y.) 787.

5. *Dalton v. Angus*, 6 App. Cas. 740, 791; *Birmingham v. Allen*, L. R., 6 Ch. Div. 284, *James, L. J.*, saying: "Whether you call it an easement or a natural right incident to property, or a right of property, it seems to me that those are only different modes of expressing the origin of the right, and do not express any difference in the right itself. Whatever it be,

The law of negligence as it affects excavations close to the line of adjoining properties has no direct relation to easements of support, and belongs to the law of torts. In excavating on his land each owner must use reasonable care, and if through failure to use such reasonable care in his method of excavating, damage is done to his neighbor's property, improved or unimproved, he is liable for the damages proximately resulting.⁶ It has been held that failure to give notice of a proposed excavation to the owner of an adjoining building which may be endangered thereby is negligence in itself, common prudence requiring that such notice be given in order that the owner of the building may shore it up or take such other measures as may be necessary to protect his building.⁷ Statutes have been quite generally enacted providing for what must be done to protect adjoining property in case of excavations in cities below a certain depth. In New York city and Brooklyn, for instance, the excavator must apply to the adjoining owner for permission to enter and shore up or brace his building so as to prevent injury thereto from the excavation if it is to extend for more than ten feet. If the permission is given he must shore up the building accordingly, or incur liability for any damage resulting. If de-

there must be, whether you use those terms or not, the idea and the substance of a dominant and servient tenement." * * *

6. See cases in following note; also in note 3, *supra*. See, also, Radcliff v. Mayor, etc., 4 N. Y. 195; White v. Nassau Trust Co., 168 N. Y. 149; McGuire v. Grant, 25 N. J. L. 356; Charles v. Rankin, 22 Mo. 566; Barnes v. Waterbury, 82 Conn. 518; Spohn v. Dives, 174 Pa. St. 474.

7. Schultz v. Byers, 53 N. J. L. 442; Lasala v. Holbrook, 4 Paige 169, 173 (dicta), Chancellor Walworth saying: "From the recent

English decisions it appears that the party who is about to endanger the building of his neighbor, by a reasonable improvement on his own land, is bound to give the owner of the adjacent lot proper notice of the intended improvement, and to use ordinary skill in conducting the same," citing Peyton v. Mayor, etc., 6 Barn. & C. 725; Walters v. Pfeil, 1 Mor. & M. 62; Massey v. Goyner, 4 Car. & P. 161.

For statements to the same effect see Shafer v. Wilson, 44 Md. 268; Beard v. Murphy, 37 Vt. 101; First Nat. Bank v. Villegra, 92 Cal. 96.

nied, he may excavate without incurring liability, provided he use due care.⁸

In England, as we have seen heretofore, if a building has stood close to the boundary line for upwards of twenty years, its owner acquires an easement that the land as encumbered by the building be supported by the adjoining land.⁹ Though there is some authority for the same rule in this country,¹⁰ it is safe to say that in the great majority of the states no such easement arises by prescription, since the erection and maintenance of a building on one's own property is in no sense a wrongful adverse user, or a user of any kind, of the adjoining property.¹¹

§ 291. Subjacent Support.— A natural right or easement of support exists between the lower and upper strata of the earth, where they are owned separately by different persons. In the case of mineral lands it is quite common to grant the lower stratum containing mineral deposits to another, the grantor retaining the surface. In such case the owner of the mine must not excavate in such way as to

8. *Dorrity v. Rapp*, 72 N. Y. 307; *Johnson v. Oppenheim*, 55 N. Y. 280; N. Y. Laws of 1855, ch. 6; Laws of 1885, ch. 456; 1 Stim. Am. St. L., §§ 1170, 2251. See *Ciffarelli v. Landidno*, 82 Conn. 126.

9. See § 285, note 19, *ante*.

10. See *dicta* stating this doctrine with approval in *Lasala v. Holbrook*, 4 Paige (N. Y.) 169, 173. See, also, *Quincy v. Jones*, 76 Ill. 231, and *Ashton v. Nolan*, 63 Cal. 269. (*Dicta*. See *Sullivan v. Zeiner*, 98 Cal. 346, *contra*.)

11. In *Gilmore v. Driscoll*, 122 Mass. 199, the court said (*dicta*): "It is difficult to see how the owner of a house can acquire by prescription a right to have it supported by the adjoining land, inasmuch he does

nothing upon, and has no use of, that land which can be seen or known or interrupted or sued for by the owner thereof, and therefore no assent of the latter can be presumed to the acquirement of any right in his land by the former." The court points out that the English cases depend on the analogous doctrine of ancient lights which is repudiated in this country.

In *Schultz v. Byers*, 53 N. J. L. 442, referring to this doctrine of easements of support of ancient buildings, the court said: " * * * Nor has such right ever been conceded in our courts." See, also, *Richard v. Scott*, 7 Watts. (Pa.) 460-464; *Sullivan v. Zeiner*, 98 Cal. 346; *Tunstall v. Christian*, 80 Va. 1.

cause a caving in or settling of the surface.¹ This right also arises by implied reservation where the owner grants away the surface, retaining the lower stratum. The owner of the lower stratum has a right as against the owner of the surface in these cases to make and maintain openings, shafts and roads in the working of the mine to such extent as may be reasonable.²

§ 292. **Party Walls.**— When two buildings on adjoining parcels have been constructed with a single wall between them, used in common for both buildings and erected on the boundary line so that part of the wall is on each of the two parcels, the common wall dividing the buildings is called a party wall. In England it is held that the parties own the entire wall as tenants in common.³ In the United States

1. *Humphries v. Brogden*, 12 Q. B. 739; *Marvin v. Brewster Iron Mining Co.*, 55 N. Y. 538; *Robertson v. Youghiogheny Coal Co.*, 172 Pa. St. 566; *Burgner v. Humhrey*, 41 Oh. St. 340; *N. J. Zinc Co. v. N. J. Franklinitite Co.*, 13 N. J. Eq. 322.

2. *Pringle v. Vesta Coal Co.*, 172 Pa. St. 438, and cases in preceding note.

In *Robertson v. Coal Co.*, 172 Pa. St. 566, 571, Williams, J., said: "Where the mineral estate is severed from the surface by a conveyance, the lower estate passes to the grantee subject to the servitude imposed upon it by nature for the support of the surface. The surface owes to the lower estate an easement or servitude for access. The lower estates owe to each other and to the surface an easement for support. The owner of the mine must leave enough of the mineral in place to answer the purposes of support for the surface unless the owner of the surface has re-

leased his right to support * * * Such release will not be implied from language that does not necessarily import it."

As to easements of support in case of separate ownership of the upper floors of a house as against the lower floors, the upper owner having the right to have his part of the house supported by the lower part, see *Harris v. Ryding*, 5 M. & W. 60; *Graves v. Berdan*, 26 N. Y. 498, the court stating (*dicta*) that the lower owner must, in England, repair his own property so that it may be able to bear the weight of the upper floors, citing *Humphrey v. Brogden*, 12 Q. B. 739; *Rowbotham v. Wilson*, 36 id. 236; *Harris v. Roberts*, 6 El. & Br. 643. See, also, *Pierce v. Dyer*, 109 Mass. 374, 376.

3. *Cubitt v. Porter*, 8 B. & C. 257; *Watson v. Gray*, 14 Ch. Div. 192; *Everett v. Edwards*, 149 Mass. 588, in which case the two theories are discussed.

it is generally held that each is the owner of so much of the wall as stands on his lot, each being subject to and having the benefit of mutual easements of support, each section or segment of the wall being bound to support the other.⁴ The question is largely academic, the incidents attaching and the practical results arrived at being the same under either theory. In favor of the English view it may be said that a wall is a distinct and complete thing in itself, like a tree growing directly on the boundary line, incapable of separate ownership in sections, and therefore the ownership of each tenant should extend to every part of it— an undivided interest in the entire wall, as in the case of adjoining owners of a tree with its trunk directly on the boundary line.⁵ On the other hand the usual incidents of a tenancy in common, such as partition, do not apply, and furthermore its ownership should follow the ownership of the land in which it stands unless clearly incompatible with its nature. There is nothing in the nature of a wall to prevent its ownership by each proprietor to the line of his lot, with mutual easements of support by which each is assured of the enjoyment of the entire wall as such. This theory is simpler, more logical, and gives a better basis for a comprehension of the incidents of party wall rights than the English theory.

Party wall easements arise most frequently by implied grant or reservation, the owners of the two lots having built on them, using a common wall, and subsequently selling one lot with its building, retaining the other, or selling the two parcels at the same time to different persons.⁶ The same result follows severance of ownership of the two parcels by the will of such owner, or by partition among his

4. *Sherred v. Cisco*, 4 Sandf. (N. Y.) 480; *Brooks v. Curtis*, 50 N. Y. 639; *Everett v. Edwards*, 149 Mass. 588, and cases cited in notes following.

5. See § 30, *ante*.

6. *Everett v. Edwards*, 149 Mass. 588; *Brooks v. Curtis*, 50 N. Y. 639; *Heartt v. Kruger*, 121 N. Y. 386; *Ingals v. Plamondon*, 75 Ill. 118; *Warfel v. Knott*, 128 Pa. St. 528.

heirs. It is obvious in such case that the intention was to create a party wall with the mutual easements of support incident to it.

When adjoining owners erect buildings with a common wall dividing them on the line, a party wall easement arises, that, necessarily, having been their intent as implied from the facts.⁷ So where a party wall is erected by one of them in building his house, the wall being placed in part on his neighbor's land, the neighbor may treat it and make use of it as a party wall without making any payment toward its cost, that part of the wall on his premises becoming his property at his election, or he may compel its removal.⁸ In any case, therefore, where a common wall is used for two adjoining houses on the dividing line it is a party wall by implied grant or agreement, or by express grant or covenant, in the absence of an express agreement to the contrary.

They may, of course, be created by express grant or covenant, the common form of party wall agreement being ex-

7. *Hicatt v. Morris*, 10 Oh. St. 523; *Rindge v. Baker*, 57 N. Y. 209; *Sherred v. Cisco*, 4 Sandf. (N. Y.) 480; *Eckleman v. Miller*, 57 Ind. 88; *Huck v. Fleutye*, 80 Ill. 258.

8. *Sherred v. Cisco*, 4 Sandf. (N. Y.) 480; *Heartt v. Kruger*, 121 N. Y. 386; *Douglass v. Coonley*, 156 N. Y. 521; *Pile v. Pedrick*, 167 Pa. St. 296; *Schmidt v. Lewis*, 63 N. J. Eq. 564; *Houghton v. Mendenhall*, 50 Minn. 40.

In these cases the party wall easement arises without a grant, covenant or other writing, though it is an interest in lands. It does not arise by an implied term of a deed, as in the case of easements created by implied grant, nor until twenty years of such user has elapsed can it arise by prescription. The ease-

ment is created by estoppel, the man who erects the wall wrongfully on part of his neighbor's land being estopped from denying that it is a party wall, should his neighbor elect to treat it as such, and his neighbor being bound by his election after making use of it as a party wall. When the wall is so erected by mutual consent, their implied agreement will be given effect, though no writing has passed between them, each being estopped from denying the existence of the party wall easement, justice requiring that the implied agreement under which the wall was erected by them be carried out. *Douglass v. Coonley*, 156 N. Y. 521, discussed further in note 8 under the following section.

erected prior to the erection of a building on one of the parcels, the owner of the other parcel promising to pay one-half the cost of the wall (or such other proportion or fixed amount as may be agreed upon), whenever he should build on his lot and make use of the wall. This agreement runs with the land so as to bind any subsequent purchaser of the vacant lot who may thereafter build on it. After the owner of the vacant parcel or any subsequent purchaser makes use of the wall, his obligation under the party wall agreement to pay therefor becomes a purely personal accrued obligation which does not run with the land thereafter so as to bind any later purchaser of the parcel. The right to enforce such payment is personal in the man who erected the wall, and does not pass with the parcel first built upon.⁹ Such party wall agreement may be limited to a definite building being erected or about to be erected, or it may apply to any building which either party may desire to erect in the future, creating permanent mutual easements in favor of and against each parcel, which could not be terminated by the destruction of any building erected under the agreement.¹⁰

Statutes providing in one form or another that in cities the owner of a lot in building thereon may erect a party wall partly on his own land and partly on his neighbor's, the neighbor to pay one-half of its cost on subsequently making use of the wall, have been enacted in several states, and have been sustained as within the police power.¹¹ It has been held or urged, in well considered cases, that such legis-

9. *Mott v. Oppenheimer*, 135 N. Y. 312; *Sebald v. Mulholland*, 155 N. Y. 455; *Cole v. Hughes*, 54 N. Y. 444; *Scott v. McMillan*, 76 N. Y. 144; *Conduit v. Ross*, 102 Ind. 166. *Contra*, *Lincoln v. Burrage*, 177 Mass. 378. See § 303, *post*.

10. *Mott v. Oppenheimer*, 135 N. Y. 312. In such case until one or the other builds on his lot it cannot

be known which will be entitled to payment from the other under the covenant, which, therefore, runs with the land until one of them builds. As to him the covenant is then personal, he and not his grantee having the sole right to enforce it whenever the party wall is used by whoever is the owner of the adjoining lot.

11. *Stim. Am. St. L.*, §§ 2170-2177.

lation is unconstitutional, since it involves the taking of private property for a private purpose, and is not a reasonable exercise of the police power.¹²

§ 293. Incidents of Party Wall Easements.—A party wall easement is not an encumbrance on either of the parcels involved. It exists for the common benefit of both parcels, used or to be used to the advantage of each, and is therefore no objection to a title.¹ Each parcel is benefited, not merely in the saving of half the cost of the wall, but in saving the additional space that an independent wall would require.

Each owner may, therefore, carry the wall up to a greater height whenever he desires to increase the height of his building, and he may widen and strengthen the foundations so much as may be necessary to carry the additional weight of the enlarged wall, taking so much additional of his neighbor's land as well as of his own as may be necessary for the purpose.² He may also extend the wall to the rear in extending the building in that direction. If this were not true party walls would be encumbrances rather than benefits. Neither owner could improve his property by enlarging his building, and each would be limited and restricted in its use and enjoyment.³ The owner who enlarges

12. *Williams v. Jewett*, 139 Mass. 29; *Trante v. White*, 46 N. J. Eq. 437, 440.

1. *Hendricks v. Stark*, 37 N. Y. 106; *Brooks v. Curtis*, 50 N. Y. 639; *Everett v. Edwards*, 149 Mass. 588; *Bertram v. Curtis*, 31 Iowa 46. But where the party wall agreement provides for the rebuilding of the wall of the same height and thickness and of the same material, binding both parcels to a perpetuation of the same wall, and in effect to the same or similar buildings, if it clearly an encumbrance within the meaning of

covenants against encumbrances, or as an objection to the title under a contract of sale. *O'Neill v. Van Tassel*, 137 N. Y. 297; *Corn v. Bass*, 43 App. Div. (N. Y.) 53; *Savage v. Mason*, 3 Cush. (Mass.) 500.

2. *Everett v. Edwards*, 149 Mass. 588; *Matthews v. Dixey*, 149 Mass. 595; *Brooks v. Curtis*, 50 N. Y. 639; *Negus v. Becker*, 143 N. Y. 303; *Lukens v. Lasker*, 202 Pa. St. 327; *Andrae v. Haseltine*, 58 Wis. 395; *Barry v. Edlavitch*, 84 Md. 95; *Field. v. Leiter*, 117 Ill. 341.

3. In *Partridge v. Gilbert*, 15 N.

the wall in any way for his own benefit cannot compel the adjoining owner to share in the cost, in the absence of express agreement to that effect. The neighbor becomes owner of the part of the enlarged wall which is situated on his land, and he can make use of it without incurring any liability to contribute toward its cost.⁴ To hold otherwise would obviously make the party wall a burden and therefore an encumbrance, as each might be required to assume a liability against his will and at the whim of the other. Where the work of carrying up or enlarging the wall is done with reasonable care and without wrong of any sort, no liability arises for incidental damages resulting to the adjoining owner.⁵

If the party wall becomes dilapidated, either owner may,

Y. 601, the old ruinous wall was torn down and a new wall, higher and with deeper foundations, was erected. In *Schill v. Brokhahus*, 80 N. Y. 614, the old wall was torn down for the purpose of erecting an entirely new and different building by the defendant. The court intimates that if a new party wall had been erected, instead of a wall entirely on the defendant's premises, he would have been within his rights. It is submitted that the extending of the wall to the rear turns on exactly the same principle as carrying the wall higher up, widening it and strengthening the foundations. The full enjoyment of each lot requires that this right exist, limited reasonably so that no unreasonable damage be caused the adjoining owner. See *contra*, as to extending or carrying higher a party wall, *Watson v. Gray*, 14 Ch. Div. 192, citing *Cubitt v. Porter*, 8 B. & C. 265; *Stedman v. Smith*, 8 E. & B. 1. But see *Standard Bank v. Stokes*, 9 Ch. Div. 68, the court stating that

one owner of a party wall, where the Metropolitan Building Act did not apply, had a right to lower the foundation so as to give him a subbasement.

4. *Walker v. Stetson*, 162 Mass. 86. In *Partridge v. Gilbert*, 15 N. Y. 601, in which case a dilapidated wall was torn down and a new one erected by one of the adjoining owners, the court expressly refused to pass on the question of whether or not the plaintiff could be compelled to contribute toward the expense of the new wall, but intimated that this could not be done. See, also, *Sherred v. Cisco*, 4 Sandf. (N. Y.) 480.

5. *Negus v. Becker*, 143 N. Y. 303. The dictum in *Brooks v. Curtis*, 50 N. Y. 639, that "the party making the addition does it at his peril; and if injury results he is liable for all damages," must be regarded as overruled by *Negus v. Becker*. See similar dictum in *Schill v. Brokhahus*, 80 N. Y. 614.

in repairing or rebuilding his structure, tear it down and rebuild it at his own expense, the other owner incurring no obligation to contribute toward the cost,⁶ and the same result would follow where the wall is so old as to require rebuilding in connection with the rebuilding of either of the houses. In either case no liability arises from incidental damage resulting to the neighbor, the work having been done with due care. But if the wall is torn down, not for the purpose of rebuilding it, but with the purpose of building a new wall entirely on one of the lots, excluding the owner of the adjoining lot entirely from its use, the owner who so demolished it is liable to the other, the destruction being wrongful.⁷

If the buildings and the wall are destroyed by fire or storm the party wall easement comes to an end unless it was created by express grant as a permanent easement affecting any and all buildings to be erected on the lots. Where it arises by implication from the erection of the houses and their ownership by different persons, it continues only so long as the buildings last and on their destruction the easement ends. Therefore neither party can rebuild the wall as before as a matter of right. The situation will be exactly the same as it would

6. *Sherred v. Cisco*, 4 Sandf. (N. Y.) 480; *Partridge v. Gilbert*, 15 N. Y. 601; *Putzel v. Drover*, etc. Bank, 78 Md. 349.

7. *Schill v. Brokhahus*, 80 N. Y. 614 (dicta); *Partridge v. Gilbert*, 15 N. Y. 601. In *Campbell v. Meiser*, 4 Johns. Ch. (N. Y.) 334, the court held that one party can compel the other to contribute toward necessary repairs of a party wall, a doubtful holding which cannot be sustained on principle. It depends on the doctrine that the parties are tenants in common of the wall. But, as heretofore pointed out, the modern rule is that no right of contribution for repairs

exists between tenants in common. See § 216, *ante*. Furthermore, they are not tenants in common, according to the American cases. The true rule would seem to be that each may repair or rebuild the wall so long as it continues as a party wall, at his own expense, or he may let it become so ruinous that it is no longer sufficient to support either building, and is practically no longer in existence as a party wall, in which case it may be removed and each owner may build as he pleases on his own property, exactly as though the wall had been destroyed by fire.

be if no party wall had ever been erected on the property. If actually rebuilt by one of them it will become a party wall if adopted and used by the other as such. But the other owner may treat it as a trespass and compel the removal of so much of it as may have been placed on his land.⁸ It would seem to follow that where both buildings become so ruinous as to be unsafe and incapable of repair, so that their destruction and removal is required, the wall may be removed and the easement ends, so that either party may rebuild without reference to the party wall.⁹

No opening for doors, windows or the like can be left by one of the parties in a party wall. The use of it as a partition wall for the common use of both owners requires that it be a solid wall without openings.¹⁰

§ 294. Ways.—A private right of way from one parcel over another is a typical easement, governed by the rules applicable to easements generally. Some of the incidents

8. *Sherred v. Cisco*, 4 Sandf. (N. Y.) 480; *Heartt v. Kruger*, 121 N. Y. 386; *Automarchi's Ex'r v. Russell*, 63 Ala. 356. See *Walker v. Stetson*, 162 Mass. 86; *Huyck v. Fleutye*, 80 Ill. 258.

In *Douglass v. Coonley*, 156 N. Y. 521, after the destruction of the buildings both parties rebuilt, using a party wall as before. A stairway had been erected along side the original party wall on one parcel and an easement granted to the owner of the other parcel to use it, it being the only means of access to the upper floors of both buildings. The court held that the intention of the parties, reasonably to be inferred from the rebuilding of the old wall by both, was to restore the easement of access by way of the stairway as well as the party wall easement, both being revived by rebuilding the party

wall as before. It would be, perhaps, more accurate to say that the parties intended to create new easements exactly like the old, and a court of equity would give effect to that intent, the party wall having been erected at their joint expense on that implied understanding. The court said: "It certainly seems but just under all the circumstances that these expectations should be realized, and hence it becomes the duty of a court of equity to work out that result, provided it can be done within established equitable principles."

9. *Partridge v. Gilbert*, 15 N. Y. 601. See, also, note 7, *supra*.

10. *Traute v. White*, 46 N. J. Eq. 437; *Normille v. Gill*, 159 Mass. 427; *Volliner's App.*, 61 Pa. St. 118; *Sullivan v. Graffort*, 35 Iowa 531.

which attach to this kind of easement call for special consideration.

A general right of way, not limited to any particular purpose or purposes, gives to the owner of the dominant estate the right to use the way for every purpose reasonably incident to the enjoyment of such estate.¹ If the dominant estate is a farm, at the time the right of way is created, used only for farming, the way is not limited to use for agricultural purposes. If the land is subdivided and sold to different persons, each erecting a house on his parcel, each will have the right to use the way for every reasonable purpose incident to the enjoyment of his parcel.² If a mine is opened on the land the way may be used in the business of mining. If a manufacturing plant or other business is established on the dominant estate, the way may be used for every reasonable purpose incident to such business.³

1. *Newcomen v. Coulson*, 5 Ch. Div. 133; *Bakeman v. Talbot*, 31 N. Y. 366 (dicta); *Brill v. Brill*, 108 N. Y. 51 (dicta).

"In *Allan v. Gomme* (11 A. & E. 759), a more strict rule was laid down than I should have been disposed to adopt; for it was said that the defendant was confined to the use of the way to a place which should be in the same predicament as it was at the time of the making of the deed. No doubt, if a right of way be granted for the purpose of being used as a way to a cottage, and the cottage is changed into a tan-yard, the right of way ceases; but if there is a general grant of all ways to a cottage, the right is not lost by reason of the cottage being altered." *Parke, B.*, in *Henning v. Burnet*, 8 Ex. 187, 192.

In *Williams v. James*, L. R., 2 Com. Pl. 577, *Bovill, C. J.*, said: When a right of way to a piece of

land is proved, then that is, unless something appears to the contrary, a right of way for all purposes according to the ordinary and reasonable use to which that land might be applied at the time of the supposed grant." In the same case, *Willes, J.*, said: "I quite agree also with the argument—that the right of way can only be used for the field in its ordinary use as a field. The right could not be used for a manufactory built upon the field." This dicta is clearly opposed to the case of *Newcomen v. Coulson*, 5 Ch. Div. 133, hereafter discussed, and *Henning v. Burnett*, *supra*. That such rule is contrary to public policy, and to the evident intent of the parties, is clear, since it would tend to prevent development of the property affected.

2. *Newcomen v. Coulson*, 5 Ch. Div. 133; *Myers v. Dunn*, 49 Conn. 71, 77.

3. *Abbott v. Butler*, 59 N. H. 317; *Whittier v. Winkley*, 62 N. H. 338;

But a way to one parcel of land cannot be used as a way to another contiguous parcel which may belong to the owner of the dominant estate, or which he may subsequently acquire. Thus a way to a stated piece of land could not be used for the purpose of removing produce grown on a parcel lying beyond it; though the court held that where such produce was stored or stacked on the dominant estate, it might subsequently be removed over the way, it appearing that the produce from the further parcel was so stacked on the dominant parcel in the honest and reasonable use of the land to which the way was appurtenant.⁴

Where the way is expressly limited, it can be used only for the limited purposes or in the limited ways provided by the grant. Thus the grant of a way for persons on foot would exclude its use for horses and carriages.⁵ A right of way to a cottage for the uses of those occupying the cottage as a residence would not include the right to use the way for the purposes of a factory erected on the premises in place of the cottage.⁶ In these cases the question is whether a general right of way for all purposes was intended, or a limited right of way restricted to stated purposes or uses. In the absence of express restriction the grant creates a

Myers v. Dunn, 49 Conn. 71, 77; *Holt v. Sargent*, 15 Gray (Mass.) 97, 102; *Sargent v. Hubbard*, 102 Mass. 380.

4. *Williams v. James*, L. R. 2 Com. Pl. 577; *Davenport v. Lamson*, 21 Pick. (Mass.) 72; *Shroder v. Brennemann*, 23 Pa. St. 348.

5. *Kirkham v. Sharp*, 1 Whart. (Pa.) 323. A right to cart timber will not give a general right of way on foot and with horses, carriages and other conveyances. *Hingham v. Rabett*, 5 Bing. N. C. 3.

6. *Henning v. Burnet*, 8 Ex. 187, 192. A right of way for carriages does not include a drift-way for cat-

tle, etc. *Ballard v. Dyson*, 1 Taunt. 279. A grant of a way for agricultural purposes does not give the right to cart coal over the way from a mine on the premises. *Cowling v. Higginson*, 4 M. & W. 245, the court, in holding that the question was for the jury whether the way had been used solely for agricultural purposes or for all purposes, said: "If the way is confined to a particular purpose the jury ought not to extend it; but if it is proved to have been used for a variety of purposes, then they might be warranted in finding a way for all." See *Hart v. Chalker*, 5 Conn. 311; *Parks v. Bishop*, 120 Mass. 340.

general right of way for all purposes. Whether the grant contains restrictions or not is a question of construction to be determined in each case as a question of fact.

A way of necessity is undoubtedly a general way for all purposes. To limit it to the purposes to which the inner parcel is devoted at the time of the sale giving rise to the easement, would be to restrict the owner of the inner parcel in the development of his property, clearly contrary to the reasonably presumed intent of the parties. Such a rule would defeat in large measure the purpose of the law in giving effect to ways of necessity.⁷

Ways by prescription, involving a user for twenty years in their creation, present considerable difficulty in determining the extent of the easement. Where the user has been for one distinct purpose, or for more than one, the user having been exercised in a definite way, the easement of way will be limited to the same purpose or purposes, and to the same mode of enjoyment. But where the user has been for miscellaneous purposes, the way having been used for every purpose that had arisen, as occasion required, exactly as a general right of way would have been used, a general right of way arises from the adverse user for twenty years. It is a question of fact to be determined in each case in view of its special facts, whether the adverse user was general, or limited in any way, and if limited, the character and extent of the limitation.⁸

7. *Whittier v. Winkley*, 62 N. H. 338, criticizing the case of *Corp. of London v. Riggs*, L. R. 13 Ch. Div. 798, 806 (in which the Master of the Rolls held that the way of necessity should be limited to a use of the inner parcel in such way as it was used at the time of the grant); *Myers v. Dunn*, 49 Conn. 71; *Camp v. Whitman*, 51 N. J. Eq. 467.

8. *Ballard v. Dyson*, 1 Taunt. 279; *Cowling v. Higginson*, 4 M. & W.

245; *Hart v. Chalker*, 5 Conn. 311; *Parks v. Bishop*, 120 Mass. 340; *Lewis v. N. Y. & Harlem R. Co.*, 40 App. Div. (N. Y.) 343; *Am. Bk. Note Co. v. N. Y. Elev. R. Co.*, 129 N. Y. 252, 266; *South Branch R. Co. v. Parker*, 41 N. J. Eq. 489; *Kurtz v. Hoke*, 172 Pa. St. 165.

The user must be confined substantially to the same route for the entire prescriptive period in order that a way may arise by prescription. If

The owner of the servient estate remains owner of the land over which the way has been granted or acquired, subject only to a reasonable use of the way by the owner of the dominant estate. He has the right, therefore, to the grass or other product growing thereon on either side of the space taken up by the actual roadway. He may drive over the way himself in the cultivation and use of his land, provided he does not interfere with the dominant owner in the enjoyment of his easement. If the way is a mere right to pass back and forth to woodland to haul wood therefrom, used only at long intervals, the servient tenant may use the entire land for pasture or hay, fencing it in as suits his convenience, making provision by barways or gates for the dominant owner's passing through the fences. In such case a formed road would not be required, and the dominant owner would have no right to build one, nor would he have the right to an open way, unimpeded by barways or gates unless so expressly provided.⁹ On the other hand, if the way granted is an easement of way for all purposes, the dominant owner having built a finished roadway as an approach to his estate, the servient owner has no right to interfere with its use by placing barways or gates across it, and in using it he must not materially injure the road-bed or obstruct passage. He may use it in a reasonable way, but if he cuts the road-bed, forming ruts by crossing it with heavy loads, or leaves stones on the road, the user is un-

no particular route was used by the adverse claimant, he passing in different directions at different times, no easement arises. *Hoyt v. Kennedy*, 170 Mass. 54.

9. *Bakeman v. Talbot*, 31 N. Y. 366, the court saying: "If the passage was made as convenient as the mode of access which a farmer usually provides for himself to get to and from his woodland, it seems to me that

the purposes of the reservation would be confirmed."

See *Dyer v. Walker*, 99 Wis. 404; *Shivers v. Shivers*, 32 N. J. Eq. 578, 35 N. J. Eq. 562; *Fankbinder v. Corder*, 127 Ind. 164.

The right to cultivate the soil over which the way exists is in the servient owner, subject to the easement. *Wells v. Tolman*, 156 N. Y. 636.

reasonable, and he may be enjoined therefrom.¹⁰ Between these two extreme cases lie the many possible situations arising out of differences in the nature of the way and its use and differences in acts of user on the part of the servient tenant. Whether or not there has been an unreasonable interference with the easement will turn in each case on the extent to which the way is used and the nature of such user, as well as upon the nature of the alleged act of interference. On the one hand the right of way must be exercised reasonably so as not to interfere unnecessarily with the rights of ownership of the servient owner, and on the other hand the servient owner must not interfere unreasonably with the right of way.

The right of the dominant owner to build a roadway and enclose the way by fences, maintaining it as an open way, will depend on the nature and extent of the user. This right ordinarily would exist in the case of any general way of approach to a dwelling,¹¹ while it would not exist in the case above referred to of a way to a wood-lot used at long intervals.¹² Maintenance of the way is imposed on the dominant owner, and responsibility for its condition to third parties rests on him rather than on the servient owner.¹³ If the way becomes impassable he is not given a license to deviate on the adjoining land of the servient tenant in order to pass the obstruction, contrary to the rule in case of an

10. *Herman v. Roberts*, 119 N. Y. 37.

11. *Herman v. Roberts*, 119 N. Y. 37; *Newcomen v. Coulson*, 5 Ch. Div. 133.

12. *Bakeman v. Talbot*, 31 N. Y. 366.

13. *Herman v. Roberts*, 119 N. Y. 37; *McMillan v. Cronin*, 75 N. Y. 474. He owes no duty to the servient owner to repair the way, other than this duty which he owes to the public generally. His right to enter and

make repairs is undoubted, not only in easements of way, but in the case of drains, water pipes and other easements involving the maintenance of a permanent structure on the servient estate. *Nichols v. Chamberlain*, Cro. Jac. 121; *Tooth v. Bryce*, 50 N. J. Eq. 589, 609; *Edgett v. Douglas*, 144 Pa. St. 95, 102; *Fisk v. Wetmore*, 15 R. I. 354, 361; *White v. Eagle, etc. Hotel Co.*, 68 N. H. 38; *Chronic v. Pugh*, 136 Ill. 539; *St. Anthony, etc. Co. v. Minneapolis*, 41 Minn. 270, 274.

obstruction of a public highway. If he does so deviate he is a trespasser. His proper course is to repair the way and remove the obstruction.¹⁴ It has been held, however, that where the servient tenant causes the obstruction, the dominant tenant may so deviate.¹⁵

Building across an alley at a sufficient height from the ground so as not to interfere with the use of the alley as a way is not an interference with a right of way through the alley;¹⁶ but where easements of light and air exist in the alley together with the easement of way, it is obvious that any building extending into the alley, and cutting off light and air would be a violation, not of the easement of way but of the easements of light and air.¹⁷ In most cases arising between abutting owners on an alley-way, easements of light and air giving mutual rights that the alley-way be left open, will be found to exist.

§ 295. Extinction of Easements, Servitudes and Profits.—Incorporeal interests in the land of another may be released by instrument in writing duly executed by the person giving up the right and delivered to the person whose land is affected. The general principles governing releases, as hereafter discussed, apply to releases of easements, servitudes and profits *a prendre*. They must satisfy the Statute of Frauds, and must comply with the law of the state in which the property affected lies as to form of execution, recording, etc. A mere parol surrender or release of an easement is void under the Statute of Frauds.

14. Taylor v. Whitehead, 2 Doug. 309, but see Hamilton v. White, 5 N. Y. 9. 745; Williams v. Safford, 7 Barb. (N. Y.) 309; Hamilton v. White, 5 N. Y. 9; Farnum v. Platt, 8 Pick. (Mass.) 339; Kent v. Judkins, 53 Me. 160; Rockland Water Co. v. Tillson, 75 Me. 170.

15. Selby v. Nettlefold, L. R. 9 Ch. 111, cases in preceding note. *Contra*, Williams v. Safford, 7 Barb. (N. Y.) 309, but see Hamilton v. White, 5 N. Y. 9.

16. Sutton v. Groll, 42 N. J. Eq. 213; Grafton v. Moir, 130 N. Y. 465; Walker v. Pierce, 38 Vt. 94; Atkins v. Bordman, 2 Met. (Mass.) 457; Gerish v. Shattuck, 132 Mass. 235.

17. Atty. Gen. v. Williams, 140 Mass. 329, and cases in preceding note.

An easement or other incorporeal property right is extinguished in any case in which the owner of the easement so deals with it or with the servient owner as to lead him as a reasonable man to believe that the easement is given up or abandoned, and to induce him, acting on such belief, to incur expense or otherwise change his position in making use of the servient estate in a way which would be inconsistent with the easement, so that the enforcement of the easement would be an injury to him, and would be unjust and inequitable because of the original position taken by the owner of the easement. In these cases there is no formal or conventional release or giving up of the easement. A parol surrender, as such, is void under the statute. It is because the owner of the easement is estopped from denying the validity of his parol surrender or modification of the easement, not the actual surrender of it, which brings it to an end. The cases are divided into two classes, turning on the same principle: (1) Easement terminated by the execution of a license given by the dominant owner to the servient owner permitting him to do something which would otherwise be a violation of the easement, the servient owner incurring expense or otherwise changing his position in executing the license so that its revocation would be an injustice to him, and (2) easements terminated by abandonment of their user, such apparent abandonment having been acted on by the owner of the servient estate, so that a subsequent enforcement of the easement would be an injustice to him. Each of these classes of cases will be separately considered.

§ 296. Extinction of Easements by Execution of Licenses.

—As stated above, the execution of a license by the servient owner on the servient estate, by which the dominant owner gave him permission to make some change or improvement of a permanent character interfering with the easement, extinguishes or modifies the easement to the extent neces-

sary to permit the maintenance of the servient estate in the altered or improved condition resulting from the execution of the license.¹ Thus where the dominant tenant had an easement of light and air in an open area, his giving permission to the owner of the area to cover it with a skylight, followed by the placing of the skylight over the area before revocation of the license to do so, gave to the owner of the area the right to maintain the skylight in that position thereafter. The executed license could not be revoked, since it would be unreasonable and unjust to permit the recall of the license after the servient owner had been led to incur expense in acting thereon.² So where an upper riparian owner was given permission by the owner of a mill lower down on the same stream to cut down and lower the bank of the stream so as to divert water therefrom, the natural right or easement of the mill owner in the stream was modified to the extent of the diversion caused by the lowering of the bank pursuant to the license.³ So where an abutting owner on a public street gave a consent or license to an elevated railroad company to erect an elevated railroad structure in the street in front of his premises, his easement of light, air and access in the street was so modified as to prevent the recovery of any damages for the maintenance of the structure in the street after its erection pursuant to such consent.⁴ Such licenses, like any others not coupled with an interest, may be revoked before anything has been done under them and before the servient owner has changed his position, so that the revocation leaves him in no worse position than before. It is because he has acted under the license, changing his position so that the revocation of the license and the consequent reassertion of the easement would be unjust, the dominant owner is estopped therefrom.⁵

1. See § 313, *c.* *post*.

2. *Winter v. Brockwell*, 8 East 308. 139 N. Y. 19.

3. *Liggins v. Inge*, 7 Bing. 682.

4. *White v. Manhattan R. R. Co.*,

139 N. Y. 19.

5. See cases in last three notes,

A license to do something on the land of the licensor cannot operate to create a new easement or to enlarge an existing one, a grant in writing being necessary in such case under the Statute of Frauds.⁶

§ 297. Extinction of Easements by Abandonment.—These cases turn on exactly the same principle as do those discussed in the preceding section. The abandonment of the easement does not in itself bring it to an end. It must appear, further, that the servient owner was induced by the apparent abandonment to incur expense in altering or improving the servient estate in a way inconsistent with the easement so that the assertion of the easement thereafter would cause him loss, and would be, therefore, unjust. Having induced this change of position on the part of the servient owner by apparently abandoning the easement, the dominant owner is thereafter estopped from enforcing it.⁷

also *Veght v. Raritan Water Power Co.*, 19 N. J. Eq. 142, 154; *Addison v. Flack*, 2 Gill (Md.) 221; *Foot v. New Haven, etc. Co.*, 23 Conn. 214, 223; *Morse v. Copeland*, 2 Gray (Mass.) 302.

6. *Fentiman v. Smith*, 4 East 107; *Hewlins v. Shippam*, 5 B. & C. 221, 229, 233; *Morse v. Copeland*, 2 Gray (Mass.) 302; *Veght v. Raritan Water Power Co.*, 19 N. J. Eq. 142.

As to the necessity for a deed of grant under the statute, and as to easements arising in equity under a parol agreement executed by the person claiming the easement, see §§ 277, 278, *ante*.

7. In *Moon v. Rawson*, 3 B. & C. 332, the plaintiff had an easement of light and air to the windows of an ancient building over the defendant's property. He demolished the old

building, erecting in its place a stable with a blank wall on the defendant's side. Fourteen years later defendant erected a building next to the blank wall, and thereafter the plaintiff opened a window in the wall and sued defendant for obstructing his lights. The court, in holding that the building of the blank wall and leaving it there for a considerable time was *prima facie* an abandonment, said: "By building the blank wall, he may have induced another person to become the purchaser of the adjoining ground for building purposes, and it would be most unjust that he should afterwards prevent such a person from carrying these purposes into effect."

In *Cook v. Mayor of Bath*, 18 L. T. R. 123, 125, in commenting on *Moon v. Rawson*, the court said: "But it

Non-user is at most only evidence of abandonment. No matter how long continued it is not abandonment as a matter of law.⁸ The non-user must be under circumstances such as would lead the average man to believe that the easement has been given up and abandoned in fact, and the servient owner must have acted thereon, changing his position so that a resumption of the user would be a hardship to him. The language of some of the cases would indicate that intentional abandonment as a matter of fact will end the easement as soon as communicated to the servient owner, whether he has acted thereon or not. It is believed, however, that in all or nearly all the cases worthy of attention the servient owner had, in fact, so acted. It is difficult to understand on what principle a mere abandonment, without a basis for estoppel in favor of the servient owner, could operate as an extinguishment of an easement or other incorporeal right in land. Personal rights are not affected by abandonment. Their extinguishment requires a release, accord and satisfaction, novation, or other formal discharge. Mere failure to assert them, and even a formal renouncing of other legal rights, unsupported by any consideration, will have no such result. The same is true of equitable rights of beneficiaries in trust property. The courts have simply been careless in these cases in working out and stating the funda-

is clear that if there had been no building erected before the expiration of the seventeen years, the plaintiff might have resumed his windows and gained a new right of action."

In *Day v. Walden*, 46 Mich. 575, 583, Cooley, J., said: "The neglect of the grantee to enjoy the easement would be no more significant in its bearing upon his rights than the neglect to enjoy the freehold to which the easement was appurtenant." See, also, *Dill v. Board of Education*, 47 N. J. Eq. 421, 428.

In *Foot v. Man. El. R. Co.*, 147

N. Y. 367, the court, referring to *White v. Man. R. Co.*, 139 N. Y. 19, and *Snell v. Levitt*, 110 N. Y. 595 (p. 371), calls particular attention to the fact that in both cases the parties affected had acted on the agreement to give up the easement. So, also, in *Conaheer v. N. Y. Central R. Co.*, 156 N. Y. 474, 485. Though these cases deal with licenses as extinguishing easements, the principle involved is the same.

8. *Ward v. Ward*, 7 Ex. 838; *White's Bank v. Nichols*, 64 N. Y. 65, and cases in preceding note.

mental principle on which extinguishment of easements by abandonment depends.⁹

Easements acquired by twenty year prescriptive user do not differ from other easements in the application of these principles. The easement having come into existence as a legal right, will continue until brought to an end in one of the ways in which easements created in any other way may be extinguished. Therefore twenty years' non-user will be evidence of abandonment only, just as one year or ten years' non-user would be.¹⁰ In several cases it has been stated, though not necessary to the decision in each case, that since the easement arose from twenty years adverse user, it will end on twenty years' non-user, whether the intention to abandon it, followed by action thereon by the servient owner, are shown to exist or not. It is manifest that this is a clear case of *non sequitur*, a logical fallacy hardly to be expected from such important courts.¹¹

9. See cases in note 7, *supra*. That title to corporeal interests are unaffected by abandonment unless an estoppel exists, or unless there is adverse possession for over twenty years. See Washburn Real Property, Vol. 3 (5th ed.), 72.

10. Pratt v. Sweetser, 68 Me. 344; Veghte v. Raritan Water Power Co., 19 N. J. Eq. 142.

11. Owen v. Field, 102 Mass. 90, 114; Barnes v. Lloyd, 112 Mass. 224; Smyles v. Hastings, 22 N. Y. 217, 223; Wiggins v. McCleary 49 N. Y. 346; Lindeman v. Lindsay, 69 Pa. St. 93; Bombaugh v. Miller, 82 Pa. St. 203; Hazard v. Robinson, 3 Mason 272, 276.

The courts may have been led into making these statements by treating seriously the fiction of a lost grant in connection with easements arising by prescription, the argument being

that twenty years non-user would overthrow such presumption, or would establish presumptively a release of the easement in due form. But it is well settled that if any such presumption exists, it is not subject to rebuttal. (See § 284, *ante*.) Furthermore, this dicta in each case presupposes the valid creation of the easement, and abandonment by non-user thereafter. The argument that a release will be presumed in such case goes too far, as there would be equal ground for implying a release from non-user for twenty years of easements created by grant, a proposition too absurd for serious consideration. Since it is now well settled that prescription does not depend on the doctrine of a lost grant, but arises from analogy to the doctrine of adverse possession of land, these arguments fail completely, and no reason can be

§ 298. Extinction of Easements by Adverse Obstruction.

—If the servient owner obstructs the easement, preventing its enjoyment for upwards of twenty years, it is brought to an end by prescription. The obstruction must be an actionable wrong open and adverse, the servient owner acquiring the right to maintain the obstruction permanently as a result of the prescriptive enjoyment thereof for the requisite period.¹

§ 299. Extinguishment by Union of the Dominant and Servient Estates.—Where title in fee to the dominant and servient estates become merged in one person, the easement comes to an end, because a man cannot have an easement in his own property.² But where he has a fee estate in

given for distinguishing in this way between easements arising by prescription and those created by grant.

1. *Dill v. Board of Education*, 47 N. J. Eq. 441; *Smyles v. Hastings*, 22 N. Y. 217; *Woodruff v. Paddock*, 130 N. Y. 618; *Chandler v. Jamaica Pond, etc. Co.*, 125 Mass. 544; *Humphreys v. Blasingame*, 104 Cal. 40.

Easements may also be extinguished by the destruction of a building or structure when they were created to continue as incident to such building or structure. Party wall easements, as we have seen (§ 293, *ante*), end with the destruction by fire or the like, of the buildings involved, and easements of way through a house to an upper floor, will end for the same reason on the destruction of the house. *Shirley v. Crabb*, 138 Ind. 200. In any case if the easement was created for all time to apply to any houses thereafter erected on the premises to take the place of the structure destroyed, the

easement will continue as a right, its use being necessarily suspended until the new building is erected. *O'Neill v. Van Tassel*, 137 N. Y. 297. A party wall easement, eavesdrip, or the like is not ended by the tearing down and rebuilding of the same structure, the burden remaining the same. *Harvey v. Walters*, L. R. 8 C. P. 162; *Partridge v. Gilbert*, 15 N. Y. 601; *Lewis v. N. Y. & Har. R. R.*, 162 N. Y. 202 (the court saying (p. 228): "Moreover the removal of one railroad structure, followed immediately by the erection of another in the same place and for the same purpose, is no evidence of an intent to abandon the prescriptive right to have a railroad structure in the street. If the new structure had not been a greater burden than the old the plaintiff would have been entitled to no relief whatever." See, also, *City Nat. Bk. v. Van Meter*, 59 N. J. Eq. 32.

2. *Nicholas v. Chamberlain*, Cro. Jac. 121; *Parsons v. Johnson*, 68 N. Y. 62.

one parcel and only a life estate or term of years in the other the easement is suspended in its enjoyment only during the continuance of the particular estate, reviving as before as soon as such estate comes to an end.³ If it turns out that title to one of the estates proves defective, his easement therein in favor of the other remains unaffected upon his losing the servient estate, though he believed he was acquiring it in fee.⁴ So where he acquires an interest as tenant in common in one estate while he holds the other in fee, the easement continues.⁵ The easement, therefore is extinguished by ownership of both estates only where such ownership is in severalty and in fee.

When the easement is so extinguished by unity of ownership, it is never revived by a separation of the ownership of the two estates at a later time. A new easement may then arise either by express grant or reservation, implied grant or reservation, or by natural right, as the case may be, of exactly the same nature and extent as before, and subject to the rules governing the creation of easements as discussed in preceding sections.⁶

3. *Thomas v. Thomas*, 2 C. M. & R. 34; *Ritger v. Parker*, 8 Cush. (Mass.) 145; *Dority v. Dunning*, 78 Me. 381; *White's Bank v. Nichols*, 64 N. Y. 65.

4. *Tyler v. Hammond*, 11 Pick. (Mass.) 193.

5. *Atlanta Mills v. Mason*, 120 Mass. 244; *Bradley Fish Co. v. Dudley*, 37 Conn. 136.

6. *Fritz v. Tompkins*, 168 N. Y. 524; *Miller v. Lapham*, 44 Vt. 416; *McCarty v. Kitchenman*, 47 Pa. St. 239. See §§ 281-284, *ante*, as to crea-

tion of easements by grant, implied grant, etc.

In *Douglas v. Coonley*, 156 N. Y. 521, after the destruction of a party wall and the buildings involved by fire, the rebuilding of buildings with the wall, created new party wall easements of exactly the same nature as existed before. The court's reference to such easements as being *revived* in such cases means no more than this.

CHAPTER XVIII.

COVENANTS RUNNING WITH THE LAND.

§ 300. **Nature and Kinds.**—Covenants which “run with the land” affect the title of the real property to which they relate because they are binding upon the succeeding owners of such property, whether grantees, devisees or heirs. Much of the difficulty and apparent confusion which exist in the cases on this topic may be avoided by seeking out and applying in each case the fundamental principles on which these covenants depend. The fundamental difference between them and ordinary personal contracts is that they run with the land in this way, binding all persons who subsequently become owners of the property by conveyance, devise or descent from the original covenantor, though such persons are not parties to the covenant, and in fact have personally made no promise.¹ Why do they run with

1. There is no doubt that a covenant between landlord and tenant affecting the tenure between the parties always “ran with the land” at common law so as to be enforceable by and against assignees of the term. The statute, 32 Henry VIII, ch. 34, provides that such covenants shall also run with the reversion so that a third person to whom the reversion may come as grantee, devisee or heir, can sue or be sued thereon. On principle there can be no question that this was true irrespective of the statute, the transfer of the tenure or relationship of landlord and tenant to the assignee of the lease and the grantee of the reversion carrying with it the right of either party to enforce covenants constituting terms of that relationship, and there is authority for this. *Williams Real Prop.* (17th

ed.), 568; *Vyvyan v. Arthur*, 1 B. & C. 410, 414. On the other hand it has been held that as the statute applies to leases under seal only, an agreement to repair made by a tenant in a parol lease could not be enforced by a grantee of the reversion. *Standen v. Christmas*, 10 Q. B. 135. See 2 *Gray's Cas. Prop.* 318, note. Under the modern cases there can be no doubt that covenants or agreements in leases running with the land in favor of or against assignees of the term are also enforceable in favor of or against assignees of the reversion. It is the transfer of the relationship or tenure existing between the landlord and tenant to the new parties that renders these covenants enforceable between them, they being terms or conditions thereof, not a mystical running with the land as such.

the land so as to bind the succeeding owners? The answer to this question ought to and does determine their nature and their limitations as well. They run with the land because they express either the terms and limitations of an estate held by one of the parties from the other in the same parcel, as when made between landlord and tenant or between life tenant and reversioner or remainderman, or the terms under which an easement or other incorporeal right shall be enjoyed, when made between the owners of the dominant and the servient estates. They run with the tenancy for years no matter how often it may be assigned because they constitute part and parcel of the tenancy, defining and limiting the terms under which it shall be held and enjoyed. Each succeeding assignee takes the estate of his assignor, limited and modified by these express provisions or limitations. If the landlord conveys the fee in reversion or remainder, subject to the term, the new landlord necessarily takes title subject to these covenants which define, limit and express the terms of the tenure under which the tenant holds.² The question arises most frequently between

2. In *Spencer's case*, 5 Co. 16a, the court said: " * * * "If the lessee covenants to repair the houses demised to him during the term, *that is parcel of the contract*, and extends to the support of the thing demised, * * * and shall bind the assignee," * * * etc.

In *Washington Natural Gas Co. v. Johnson*, 123 Pa. St. 576, 591, the court said: "Acquiring the leasehold estate by an assignment of the lease he is fixed with notice of its covenants, and he takes the estate of his assignor *cum onere*. But as his liability grows out of privity of estate, it ceases when the privity ceases. * * * Each successive assignee would be liable for covenants matur-

ing while the title was held by him because of privity of estate; but he would not be liable for those previously broken, or subsequently maturing, because of the absence of any contract relations with the lessor. While he holds the estate and enjoys its benefits, he bears its burdens, but he lays down both the estate and its burdens by an assignment, even though, as is said in some of the cases, his assignment be to a beggar."

In *Vernon v. Smith*, 5 B. & Ald. 1, Bayley, J., said: "The rule is, that if the covenant respect the thing demised, *and be coextensive with the estate of the person to whom it is made*, and be made with him and his assigns, it passes to his assignee."

landlord and tenant, and the cases involving such covenants in leases are discussed in the chapter on Landlord and Tenant.³ Similar covenants limiting and defining the way in which a life tenant shall hold and enjoy his estate, and determining the relationship between him and the remainderman run with the land, so as to bind the successive owners of either interest, in the same way and for the same reasons.⁴

Covenants between adjoining owners limiting and defining the use of easements, the maintenance and repair of dams, ways, pipes, drains, and the like, the making of improvements in connection therewith, and compensation therefor from one to the other, necessarily run with the two estates involved, because they are terms of the easement or servitude affecting the two estates. Cases illustrative of covenants of this nature are discussed hereafter.⁵

Many so called covenants run with the land because they create easements, which, of course, continue to be binding between the succeeding owners of the dominant and servient estates, no matter how often either estate is transferred, either by deed, devise or inheritance.⁶

In equity if a grantee has taken title to property under an agreement, whether in the form of a covenant or merely by parol, to do or to refrain from doing something affecting the use and enjoyment of the property, and which consti-

See discussion of the requirement of privity of estate between the parties to a covenant running with the land in § 301, *post*.

3. See §§ 176, 177, *ante*.

4. Undoubtedly covenants between tenants in common or joint tenants, made for the purpose of permanently providing for the use and enjoyment of the property by each of them, runs with the land so as to bind all subsequent purchasers of the interest of any cotenant, if made and recorded in due form, disclosing an intent to

bind the interests of each, not to create a merely personal obligation. *Thompson v. Hakewill*, 19 C. B. (N. S.) 713; *Coleman v. Coleman*, 19 Pa. 100, cited in *Horn v. Miller*, 136 Pa. St. 640; *Denman v. Prince*, 40 Barb. (N. Y.) 213 (covenant between co-owners of a mill privilege as to repair of dam and use of water by each); *Taylor v. Baldwin*, 10 Barb. (N. Y.) 58.

5. See § 302, *post*.

6. See § 278, note 10, *ante*, and § 304, note 6, *post*.

tuted part of the consideration for the conveyance, if it is a contract which equity would specifically enforce as between the original parties it will also enforce it as against any subsequent purchaser taking with notice of the covenant or agreement. These cases belong to the law of specific performance of contracts in equity. The purchaser taking with notice ought in good faith and fair dealing to be compelled to abide by the covenant affecting the land in such case, whether it is one which runs with the land at law or not.⁷ The subject is divided, therefore, into (a) covenants running with the land at law, and (b) covenants enforceable in equity as against subsequent purchasers with notice, whether they run with the land at law or not, each of which will be separately considered.

§ 301. Covenants Running with the Land at Law; Landlord and Tenant.—A covenant between landlord and tenant which is purely personal, in no way limiting or defining the tenancy or the terms thereof, is binding like any other contract only upon the original parties and their personal representatives, subject to the law of assignment of contracts, but in no way running with the land.¹ But a covenant

7. See § 304, *post*.

1. Covenants relating to personalty leased in connection with realty are personal and do not run with the land. *Spencer's case*, par. 3, 5 Co. 16a. A covenant not to employ certain persons in the leasehold premises unless legally settled in that parish, was personal only, the employment of such persons having nothing to do with the land, except in a remote way through possible effect on the poor rates. *Congleton v. Pattison*, 10 East 130. Covenant to pay taxes on other premises is personal only. *Gower v. Postmaster Gen.*, 57 L. T. R. 527.

In *Bally v. Wells*, 3 Wils. 25. the court said: "But if they in no manner touch or concern the thing demised, as to build a house on other land, or to pay a collateral sum to the lessor (not rent or in the nature of rent) the assignee, though named, is not bound by such covenants."
* * *

In *Dolph v. White*, 12 N. Y. 296. a promise by one joint maker of a note to the other to pay it in consideration of a lease, and recited therein, did not bind his assignee, being a collateral promise to pay a sum of money to a third person, in no sense rent or in the nature of rent.

fixing the terms of the tenancy, as a covenant to pay rent, or to render any service in the nature of rent,² or a covenant restricting the tenant in the use of the property,³ or a covenant to repair on the part of either,⁴ or to keep the premises insured for the benefit of the other,⁵ or not to assign or to sublet,⁶ or a covenant to renew the lease on terms stated,⁷

2. *Bedford v. Terhune*, 30 N. Y. 453; *Sanders v. Partridge*, 108 Mass. 556; *Baldwin v. Walker*, 21 Conn. 168; *Fennel v. Guffey*, 139 Pa. St. 341; *Webster v. Nichols*, 104 Ill. 160; *Salisbury v. Shirley*, 66 Cal. 223. See § 176, note 6. *ante*.

In *Vyvyan v. Arthur*, 1 B. & C. 410, a covenant by the tenant to have his corn grown on the leased premises, ground at the landlord's mill was held to run with the land so as to bind the successor of the original tenant for a breach committed by such successor. The provision requiring the use of the landlord's mill for grinding purposes was in the nature of rent, which passed with the revision.

A covenant to pay taxes or assessments runs with the land so as to bind the assignee. *Post v. Kearney*, 2 N. Y. 394; *Salisbury v. Shirley*, 66 Cal. 223.

3. *Wertheimer v. Hosmer*, 83 Mich. 56; *Crowe v. Riley*, 63 Oh. St. 1; *Granite Bld. Corp. v. Greene*, 25 R. I. 586; *Bradford Oil Co. v. Blair*, 113 Pa. St. 83.

4. *Spencer's case*, 5 Co. 16a; *Trognam v. Pickard*, 2 B. & Ald. 105; *Minshull v. Oakes*, 2 H. & N. 793; *Myers v. Burns*, 33 Barb. (N. Y.) 401; *Lehmaier v. Jones*, 100 App. Div. (N. Y.) 495; *Silberberg v. Trachtenberg*, 58 Misc. (N. Y.) 536; *Gordon v. George*, 12 Ind. 408; *Peck v. Christman*, 94 Ill. App. 435.

5. *Vernon v. Smith*, 5 B. & Ald. 1;

Masury v. Southworth, 9 Oh. St. 340; *Thomas v. Vonkapff*, 6 Gill & J. (Md.) 381, it appearing in these cases that the insurance money was to be used to rebuild. In *Reid v. McCrum*, 91 N. Y. 412, the court held that a covenant by a mortgagor to keep the premises insured for the benefit of the mortgagee did not run with the land so as to bind a subsequent grantee, being a merely personal covenant.

6. *Williams v. Earle*, L. R. 3 Q. B. 739; *Hersey Est. v. Steiger*, 2 Q. B. 79. It has been asserted that the lease must provide that neither the tenant nor his assigns shall assign, etc., otherwise the covenant is personal to the tenant, not binding on his assignee. The restriction of the right to assign the lease during the term is certainly one of the terms of the tenure between the tenant and his landlord, and it is difficult to see why it should not be held binding on assigns whether they are referred to or not in express terms. Cases holding that a consent to assign in cases where assignees are not named in the restriction, removes it altogether, are based on this construction, that assignees are not bound unless named. See § 230, *ante*, under rule in *Dumpor's case*. See 1 *Smith's Lead. Case*. (11th ed.), at p. 73, notes to *Spencer's case*.

7. *Simpson v. Clayton*, 4 Bing. N. C. 758; *Wilkinson v. Pettit*, 47 Barb.

all run with the land, binding either party on the transfer of his interest, because they are terms of the lease, part of the interest, or limitations upon the interest, transferred, constituting terms of the tenure or relationship existing between the landlord and tenant, and transferred to the new landlord or the new tenant, by conveyance or assignment, as the case may be.

In Spencer's case⁸ it was held that a covenant by a tenant to build a brick wall on the leased premises did not run with the land, the wall not being in existence, and therefore not part of the land, when the covenant was made, but that it would have been binding upon the assignee if expressly made binding upon the assigns of the tenant. The rule is there stated that a covenant relating to something not *in esse* does not run with the land, unless the tenant's assigns are expressly named, since the covenant cannot attach to that which is not in existence.

It is submitted that this distinction is without merit and it has been sharply questioned or repudiated in some of the later cases. A covenant to keep in repair buildings thereafter to be erected runs with the land, though relating to something not *in esse* at the time the covenant was made.⁹

(N. Y.) 230; Leomister Gaslight Co. v. Hillery, 197 Mass. 267; Blackmore v. Boardman, 28 Mo. 420; Leppa v. Mackey, 31 Minn. 75; Leiter v. Pike, 127 Ill. 287.

⁸ 5 Co. 16a.

⁹ Minshull v. Oakes, 2 H. & N. 793. In referring to Spencer's case, the court said: "No reason is given for the alleged difference between where the assignee is and is not named; on the contrary the reason given for binding in any case an assignee not named, viz., that he takes the benefit and burden, seems equally to apply to every such case." See Smith's Lead. Cas. (10th ed.), 66-69.

In Peters v. Stone, 193 Mass. 179, a covenant by the tenant to make improvements to the value of \$1,000 and to leave them on the premises at the end of the term was held to bind assigns, though "assigns" were not mentioned, it being one of the terms of the letting, intended clearly to add to the value of the land. In Frederick v. Callahan, 40 Iowa 311; Ecker v. Fitzer, 65 Wis. 55; Bailie v. Rodway, 27 Wis. 172, covenants by the landlord to pay for improvements to be erected by the tenant were held to run with the land, though assigns were not named. In Masury v. Southworth, 9 Oh. St. 340, a cove-

The use of the word " assigns " can make no possible difference. A covenant to erect a wall or a new building on the part of the tenant, the tenant having the entire term in which to perform, ought to bind his assignee, it being one of the express terms under which the land is held, a burden attaching to the term which the assignee must accept with the benefits. There is no good reason for distinguishing between such a covenant and a covenant to pay rent, to pay taxes, to grind all his corn at the landlord's mill, and other covenants expressing the terms under which the tenant holds the land of the landlord.¹⁰

A covenant by the landlord to pay for improvements erected by the tenant at a valuation to be arrived at at the end of the term runs with the land so as to be enforceable by the assignee in recovering for improvements erected by himself, but he cannot recover for improvements erected by his assignor, the original tenant. When the original tenant made improvements his right to receive their value on appraisal at the end of the term becomes a personal right to a contingent sum of money, having no connection with the land or the tenure existing between the landlord and tenant, and for that reason the right to collect that amount would not pass to the assignee of the term, unless expressly

nant by the tenant to keep the buildings insured and to rebuild with insurance money, was held to run with the land, that being the obvious intent, though " assigns " were not referred to. The true principle is stated in this case that the word " assigns " is of value only as showing intent that they should be bound; but when that intent is sufficiently shown by other language or by the nature of the covenant, assigns will be bound as though named. On the other hand the rule laid down in Spencer's case is followed in Hansen v. Meyer, 81 Ill. 321; Gardner v.

Watson, 18 Ill. App. 386, aff'd 119 Ill. 312; Bailey v. Richardson, 66 Cal. 416; Hartung v. Witte, 59 Wis. 285 (*contra* to Wisconsin cases above cited); Gulf, etc. R. Co. v. Smith, 72 Tex. 122. The rule is further supported by *dicta* in several cases, viz.: Thompson v. Rose, 8 Cow. (N. Y.) 266; Conover v. Smith, 17 N. J. Eq. 57; Brewer v. Marshall, 18 N. J. Eq. 337; Tallman v. Coffin, 4 N. Y. 134; Coffin v. Tallman, 8 N. Y. 465; Douglaston Realty Co. v. Hess, 124 App. Div. (N. Y.) 508.

10. See preceding note.

assigned to him like any other personal chose in action.¹¹

A covenant by the landlord not to engage in business of the kind to be carried on by the tenant within a stated distance from the leased premises has been held not to be enforceable by the assignee of the tenant because it does not touch or concern the land directly, but only its beneficial enjoyment.¹² Speaking about a covenant to keep the buildings insured for the benefit of the landlord, the court said in *Vernon v. Smith* (5 B. & Ald. 1): "It is a covenant beneficial to the owner of the estate, and to no one but the owner of the estate; and therefore may be said to be *beneficial to the estate*, and so directly within the principle on which covenants are made to run with the land." In the case above referred to, the covenant not to engage in a competing business during the life of the lease is beneficial to the estate of the tenant. Compensation therefore is included in the rent. If the original tenant after assigning his term could still enforce the covenant, it would be undoubtedly personal, and the decision referred to would be sound. But the covenant is made for the benefit of the leasehold estate,

11. *Thompson v. Rose*, 8 Cow. (N. Y.) 266, was correctly decided as the assignment of the lease was made after the improvements were erected, the assignee acquiring no right to recover for them, but the court was wrong on principle in stating that the covenant could not run with the land in any event because the word "assigns" had not been used. In *Hansen v. Meyer*, 81 Ill. 321, *Gardner v. Watson*, 18 Ill. App. 386, aff'd 119 Ill. 312, and *Bailey v. Richardson*, 66 Cal. 416, it was held that the word "assigns" was necessary to make the covenant run with the land. That this covenant will run with the land though the word "assigns" is not used, was held in *Frederick v. Calla-*

han, 40 Iowa 311; *Ecke v. Fitzer*, 65 Wis. 55; *Bailie v. Rodway*, 27 Wis. 172, and the same principle was involved in *Peters v. Stone*, 193 Mass. 179. See cases under party wall covenants, § 303, note 3, *post*.

12. *Thomas v. Hayward*, L. R., 4 Ex. 311. In *Norman v. Wells*, 17 Wend. (N. Y.) 136, it was held that the covenant made by the landlord in a lease of a mill site not to erect another mill on the same stream ran with the land so as to be enforceable by an assignee of the term.

See discussion of this question and of the cases involved where the covenant is made by a grantor or grantee in fee, § 304, *post*, notes 17 and 18.

not of the tenant personally, and could not be enforced at all unless enforceable by the assignee of the term. It constitutes one of the terms of the letting, of the tenure between the tenant and his successors on the one hand, and the landlord on the other. It would seem, therefore, that covenants of this kind are not collateral, but should be held enforceable by assignees.

A covenant or contract by a third person guaranteeing payment of the rent, is a collateral contract which does not run with the land so as to be enforceable as such by an heir or grantee of the landlord. The surety is not a party to the lease, and his contract does not in any way affect the estate of the tenant or the tenure existing between him and his landlord.¹³ It has been held, however, that such guaranty passes with the right of action to recover the rent as an incident thereof, so that the successor in interest of the landlord, as his heir, devisee or grantee, may hold the guarantor, not because the contract of guaranty runs with the land, but because it runs with the right to collect the rent, which, of course, passes with the reversion to the successor in interest of the landlord.¹⁴

The incidents arising between landlord and tenant in the enforcement of covenants running with the land, including the personal liability of the original parties to the covenant

13. *Walsh v. Packard*, 165 Mass. 189. It is stated in this case that the personal representative of the deceased landlord, on recovering from the guarantor, must account for the amount recovered as trustee to the heirs, the real parties in interest who alone are injured by failure to pay the rent.

14. In *Harbeck v. Sylvester*, 13 Wend. (N. Y.) 608, 609, the court regarded the right to hold the guarantor of rent as passing by implied assignment to the grantee of the landlord,

who could sue thereon in the landlord's name. Under the Code, permitting assignees of choses in action to sue in their own names, the grantee may sue the guarantor in his own name without using the name of the grantor. *Holm v. Claus Lipsins Brew. Co.*, 21 App. Div. (N. Y.) 204. In *Allen v. Culver*, 3 Denio (N. Y.) 284, the same position, in effect, was taken, though the court speaks of the guaranty as running with the land.

throughout, the liability of the assignee for breaches committed by him before reassigning the term, and his freedom from liability for breaches thereafter committed, are discussed in detail under the chapter on Landlord and Tenant.¹⁵

§ 302. Covenants Affecting Easements and Servitudes.—

When the owners of the dominant and servient estates, either in the same instrument creating the easement or at any time after its creation, execute covenants relating to the easement, defining or limiting the nature and extent of the user thereunder, providing for the repair of the roadway, dam, pipes, or other structure used in the enjoyment thereof, or in any other way limiting and defining the easement and the mutual rights and liabilities of the parties thereunder, the covenant or covenants so executed run with the land so as to be enforceable by any subsequent owner of the dominant estate as against any subsequent owner of the servient estate. They constitute terms of the easement, and they "run with the land," simply because the easement affected runs with the land, binding the servient estate for the benefit of the dominant estate no matter how frequently title to the two estates may be transferred.¹

15. See §§ 176, 177, *ante*, under Landlord and Tenant, Covenants in Leases.

1. *Morse v. Aldrich*, 19 Pick. (Mass.) 449 (covenant modifying and defining user of easement in a pond, entered into some time after the easement was created); *Fitch v. Johnson*, 104 Ill. 111; *Batavia Mfg. Co. v. Newton Water Co.*, 91 Ill. 230; *Sterling Hydraulic Co. v. Williams*, 66 Ill. 393; *Nye v. Hoyle*, 120 N. Y. 195; *Denman v. Prince*, 40 Barb. (N. Y.) 213; *Horn v. Miller*, 136 Pa. St. 640; *Weil v. Baldwin*, 64 Cal. 476 (last six cases holding that covenants made between owners of water rights

in same stream providing for use thereof, repairs of dam, etc., run with the land); *Burbank v. Pillsbury*, 48 N. H. 475; *Hazlett v. Sinclair*, 76 Ind. 488; *Midland R. Co. v. Fisher*, 125 Ind. 19; *Lake Erie, etc. R. Co. v. Priest*, 131 Ind. 413; *Bronson v. Coffin*, 108 Mass. 175; *Dorsey v. St. Louis, etc. R. Co.*, 58 Ill. 65; *Huston v. Cincinnati, etc. R. Co.*, 21 Oh. St. 236 (in last eight cases covenants to build and maintain line fences made by grantor or grantee were held to run with the land creating easements and defining terms thereof, the grantee retaining adjoining land). *Peden v. Chicago*,

There must be, as stated by the courts, "privity of estate" between the parties in order that the covenant run with the land, and the covenant must relate to the interest in connection with which the privity exists. Much of the confusion in the cases arises from the use of the term "privity of estate," the sense in which it is used not being at all clearly expressed, and probably not always clearly formulated in the minds of the judges. The term evidently means a connection or relationship between the parties with reference to the estate. As between landlord and tenant and between life tenant and reversioner or remainderman the privity clearly arises out of the tenure existing between them, which, as we have seen, was not affected in these cases by the statute *Quia Emptores*.² But where the parties are owners in fee of adjoining property with an easement existing in favor of one estate against the other, the "privity" between them arises solely from the fact that they are mutually interested in the easement. There is no reason why they should not be able to modify or restrict the enjoyment of the easement by covenants between them executed and recorded in due form so as to be effective as grants, nor is there any reason why such restrictions and modifications should not be binding on subsequent owners of the two properties involved. It is entirely immaterial whether the easement exist as a natural right in a flowing stream or arise by express or implied grant.³ Yet it has been held that covenants between own-

etc., R. Co., 73 Iowa 328 (holding that covenant by R. R. Co. that surface water should not be discharged across to opposite side of right of way granted by the covenantee ran with the land); *Dexter v. Beard*, 130 N. Y. 549 (covenant not to build on right of way granted, ran with land as incident to the easement of way).

In England it is held that covenants creating burdens on the land

affected do not run with the land except as between landlord and tenant. *Austerberry v. Oldham*, 29 Ch. Div. 750, and cases therein cited and discussed. Such covenants are enforceable in equity, however, as against purchasers with notice. See § 304, *post*.

2. See § 75, *ante*.

3. To that effect see cases in note 1 preceding.

ers of mills in a river regulating the use of the water at their respective mills did not "run with the land" because of a supposed lack of privity of estate, the riparian right of each mill-owner not having been acquired, the one from the other, by grant, express or implied.⁴ Nevertheless if their natural rights or easements had been turned into conventional easements, by grant modifying them ever so slightly, the covenants in question if subsequently made, would have been held binding upon successors in interest of the different mill-owners. This unreasonable result follows from the assumption that the privity of estate required means the relation of grantor and grantee between the parties irrespective of whether a mutual interest exists in them or not. That this is not true appears very clearly from cases involving a grant in fee, with a covenant restricting the use or the property conveyed, where the grantor is not the owner of any adjoining property, and therefore where no easement is created for the benefit of any dominant estate, or where the grantor covenants to keep in repair buildings or to make improvements on the land conveyed. Such covenants are purely personal though the relation of grantor and grantee exists between the parties.⁵ Covenants run

4. *Hurd v. Curtis*, 19 Pick (Mass.) 459; *Lawrence v. Whitney*, 115 N. Y. 410, 416; *Horn v. Miller*, 136 Pa. St. 640, cited in note 1, *supra*, is directly *contra*.

5. It is, of course, perfectly obvious that where the grantor conveys the property in fee, retaining no adjoining property for the benefit of which the covenant might have been made, so that it is a purely personal chose in action in him, and not creating a profit or easement in gross, it cannot run with the land conveyed, whether it be a benefit or a burden to the grantee or his successors in interest, and though it relate to the

land conveyed in the closest way. Thus if the grantee in fee covenants to keep buildings in repair, it is clear that his contract is personal, differing in no way from a like contract made by a local contractor or village carpenter, or any other stranger. So a covenant by the grantee restricting his use of the property in any given way is enforceable as a covenant against himself only, not his subsequent grantee, the covenant being reserved for the personal benefit of the grantor, not for the benefit of adjoining property belonging to him, nor as incident to an easement retained by him. It is not a grant or reser-

with the land only where the parties have a mutual interest in the property affected, and the only cases that have arisen

vation, since no interest in the land conveyed is reserved, and for the same reason it is not incident to any interest in the land conveyed, since the grantor has reserved no interest. It differs radically from a condition with a right of entry and forfeiture reserved for a breach thereof, such right of entry involving the defeat of the estate conveyed, not the enforcement of a contract against one who was not a party to it.

In *Norcross v. James*, 140 Mass. 188, Judge Holmes said: "When it is said that in this class of cases there must be a privity of estate between the covenantor and the covenantee, it only means that the covenant must impose such a burden on the land of the covenantor as to be in substance, or to carry with it a grant of an easement or quasi easement, or must be in aid of such a grant."

In *Morse v. Aldrich*, 19 Pick. (Mass.) 449, the court said: " * * * In most of the cases on the same subject (covenants running with the land), the covenants were between lessors and lessees; but the same privity exists between the grantor and grantee, where a grant is made of any subordinate interest in land; the reversion or residue of the estate being reserved by the grantor, all covenants in support of the grant, or in relation to the beneficial enjoyment of it, are real covenants and will bind the assignee."

In *Van Rensselaer v. Reed*, 26 N. Y. 558, the reservation of a rent charge by the grantor was sufficient interest in the land so that the cove-

nant to pay the annual rent ran with the land and was enforceable against subsequent grantees.

That the covenantee as well as the covenantor must have an interest of some sort in the land conveyed to which the covenant may attach, see, in addition to cases in notes preceding, *Gilmer v. Mobile & Montgomery R. Co.*, 79 Ala. 569; *Louisville H. & St. R. Co. v. Baskett*, 121 S. W. 957 (Ky.) (both cases involving covenants to maintain station and stop trains, etc., for the benefit of land retained by grantor, who acquired a right in the nature of an easement, like the quasi-easement, so-called, to build and maintain line fences in cases cited in note 1, *supra*); *Fresno Canal, etc. Co. v. Rowell*, 80 Cal. 114 (covenant with Water Co. to take water for stated term of years did not run with land; it was personal, since Water Co. obtained no interest in the land); *Indianapolis Water Co. v. Nulte*, 126 Md. 373 (contract by adjoining owner to extend levee on his own land and to keep it in repair was personal, since no interest in land of covenantor existed or was created in favor of the plaintiff Water Co.); *Costigan v. Penn. R. Co.*, 54 N. J. L. 233; *Plymouth v. Carver*, 16 Pick. (Mass.) 183; *Kettle Riv. R. Co. v. East. R. Co.*, 41 Minn. 461.

In *Lyon v. Parker*, 45 Me. 474, the defendant, stranger to the title of the land affected, covenanted to build a dam with co-owners of a water tower. Held to be personal, unenforceable by a purchaser from a covenantee, the covenantor having no interest in the land affected. The lack of privity

or can properly arise of such covenants enforceable by or against grantees or other succeeding owners are those made between landlord and tenant, between tenant for life or in tail and remainderman or reversioner, between tenants in common or joint tenants, and between the owners of dominant and servient estates limiting or modifying easements, servitudes or profits.

Since covenants affecting easements and other incorporeal rights affect the title to the easement or other incorporeal rights involved they must be in such form that they can take effect as grants, they being terms of the easement created or modified by the instrument containing the covenants. If in the cases above referred to, in which mutual covenants of owners of land on a stream relating to the use of the water power were held to be personal because of lack of privity, the courts had regarded the covenants as mutual grants modifying the natural rights of the parties to the water powers, all difficulty would have disappeared, and covenants relating to repairs, and the like, would be treated as terms of the grants modifying the water rights involved.

It would seem that an entire discontinuance of the use of the term "privity of estate" in this connection would tend strongly to clear up the confusion now existing in the cases. What is really required in order that a covenant run with the land is a mutual interest in the property, corporeal or incorporeal, to which the covenant relates, and which it is intended to modify or limit, by way of grant, or as a term of a grant. On no other basis whatever can the legal title be affected at law by a contract otherwise enforceable only as a personal chose in action.⁶ The enforcement by specific performance in equity of covenants or agreements relating to land, and the enforcement of covenants for title turns on principles peculiar to each class, and have no controlling relation to the covenants here considered.⁷

was because of lack of mutual interest in the land.

6. See preceding note.

7. See § 304, *post*, as to covenants enforceable in equity, and §§ 324, 325, *post*, as to covenants for title.

There is some authority for the proposition that a covenant binding the covenantor personally, not a burden or restriction upon adjoining property, but made for the benefit of property conveyed by the covenantor, and forming part of the consideration involved in the transaction, will run with the land so benefited, the personal obligation of the covenantor for some reason attaching to the land conveyed as an incident to the title. Thus a covenant by the grantor not to engage in the banking business in Dover, the place where the banking property conveyed by him was situated, was held to be enforceable at law by a subsequent grantee of the covenant, it having been expressly provided that it should be so enforceable.⁸ A similar covenant restricting the grantee from selling marl from the premises conveyed, for the benefit of land retained by the grantor, was held not to run with the land, being a burden on the land conveyed, and not directly touching or affecting the land retained.⁹ It is submitted that this question is solely a question of contract, not of title to land. We have seen that in the United States covenants creating burdens on the property affected run with the land as between landlord and tenant and when made in the creation or modification of easements, though the opposite rule in the case of easements prevails in England.¹⁰ If the personal contract of the grantor in fee not to engage in competitive business, or to keep the premises conveyed in repair, or the like, is

8. *National Bank at Dover v. Segur*, 39 N. J. L. 173, citing *Pakenham's case*, Year Book, 42 Edw. III 7, pl. 14. The other cases cited in the above case, viz., *Vyvyan v. Arthur's Admr's*, 1 B. & C. 410; *Vernon v. Smith*, 5 B. & Ald. 1; *Mayor of Congleton v. Pattison*, 10 East 130, do not at all sustain the position taken.

See dictum in *Shaher v. St. Paul Water Power Co.*, 30 Minn. 179, 183,

that a covenant conferring a benefit on the grantee and covenantor may be made by the grantee or a stranger, and it will nevertheless run with the land if the thing covenanted for be for the benefit of the land conveyed or tend to increase its value.

See note 5 preceding.

9. *Brewer v. Marshall*, 3 C. E. Green (N. J.) 337, 4 id. 537.

10. See notes 1 and 5, *supra*.

enforceable by a subsequent purchaser of the land affected, it must be on principles of contract, not of title to property. The enforcement of such a contract in equity by specific performance, hereafter discussed,¹¹ is also a question of contract, having nothing to do with the modification of title to land by covenant running with the land at law.

§ 303. Party Wall Covenants.— When the owners of two adjoining lots enter into a written agreement or covenant that one or either of them may erect a party wall on their dividing line, and that the other will pay him one-half the cost thereof, or one-half the value of the wall when used, or other sum specified in the agreement, mutual party wall easements arise by grant between the parties, and the terms of the covenant or agreement, qualifying and defining the easements or incident thereto, run with both parcels so as to bind subsequent purchasers of either, or in favor of either one, as the case may be.¹ These cases are clear illustrations of covenants creating or limiting easements, and therefore running with the two parcels of land involved, as discussed in the preceding section.

While the covenant or agreement is entirely executory, in other words before the wall has been erected by either party, it runs with the land both as to benefits and burdens, and if a subsequent grantee of one parcel erects the wall he may enforce the covenant against the original owner or any subsequent grantee of the other parcel who makes use of the wall, collecting from him one-half the cost thereof.² But when the wall has been erected the right to collect therefor under the agreement becomes a personal right of action in the man who erected it, contingent upon the making use

11. See § 304, *post*.

1. See § 292, notes 9 and 10, *ante*.

2. *Savage v. Mason*, 3 Cush. (Mass.) 500; *King v. Wight*, 155 Mass. 144; *Mott v. Oppenheimer*, 135 N. Y. 312; *Lebald v. Mulholland*, 155

N. Y. 455; *Conduitt v. Ross*, 102 Ind. 166; *Mackin v. Haven*, 187 Ill. 480; *Roche v. Ullman*, 104 Ill. 11; *Gibson v. Holden*, 115 Ill. 199; *Garmire v. Willy*, 36 Neb. 340, and cases in following note.

of it by the owner of the other parcel. Therefore if the builder of the wall conveys his parcel the purchaser acquires no right to recover one-half the cost thereof from the adjoining owner upon his using the wall. The executory covenant runs with the land, but the personal right of the man who erects the wall to get back half its cost is a definite contingent chose in action belonging to him as personal property, having no connection with his land, and certainly not passing with it.³ Yet the courts in some cases have had difficulty in reaching this result, and in some states the rule seems established, though obviously erroneous, that the right to recover in such case passes with the land on a conveyance thereof by the builder of the wall, the argument being, that as the land must bear the burden of the use of the wall by the adjoining owner, it is fair that the purchaser should receive the payment provided for under the agreement.⁴ The uncertainty on this point is difficult to

3. *Cole v. Hughes*, 54 N. Y. 444; *Hart v. Lyon*, 90 N. Y. 663; *Scott v. McMillan*, 76 N. Y. 141, 144; *Sebald v. Mulholland*, 155 N. Y. 455; *Joy v. Boston Penny Sav. Bank*, 115 Mass. 90; *Block v. Isham*, 28 Ind. 37.

4. *Platt v. Eggleston*, 20 Oh. St. 414; *Kimm v. Griffin*, 67 Minn. 25 (distinguishing *Pillsbury v. Morris*, 54 Minn. 492, which held that the builder of the wall had a personal chose in action which he could assign); *Nat. Life Ins. Co. v. Lee*, 75 Minn. 157 (see strong dissenting opinion expressing the true principle involved).

In *King v. Wight*, 155 Mass. 444, the court expressly refused to pass on this point, it not being involved in the case.

Where the party wall covenant or agreement does not contemplate the immediate building of a wall by one

of the parties, but provides that either one, his heirs or assigns, may erect such a wall at any time in the future, and providing for payment therefor by the other on his using the wall, the covenant is executory and runs with the land in all respects until the wall is erected; the right to recover one-half the cost then becomes a personal right of action in the builder. Such were the cases of *Mott v. Oppenheim*, 135 N. Y. 312, and *King v. Wight*, 155 Mass. 444. Because the covenant in such case runs with the land so as to give a subsequent purchaser who *builds the wall* the right to collect from the adjoining owner who subsequently makes use of it, the difficulty and confusion seems to have arisen, it not having been clearly understood in some of the cases that when the wall is actually built, the indefinite and imper-

understand in view of the fact that the principle involved is a simple one, settled absolutely and without question in cases of covenants running with the land between landlord and tenant. For example, the covenant to pay rent unquestionably runs with the land so as to bind assignees of the tenant and grantees of the landlord. Yet where rent has become overdue no one would contend that the landlord's right to collect it passes with the reversion to his grantee. The same result follows in the case of any accrued right of the landlord against his tenant for breach of any other covenant. It is his personal property, a personal chose in action, which does not pass on a subsequent conveyance of the reversion. Yet the covenant as an executory contract runs with the land so that such grantee may sue for a breach committed by the tenant after such conveyance.⁵

It has been held in several cases that after the erection of the wall and before its use by the adjoining owner, it is

sonal covenant, obviously made for the benefit of the land, is changed, in so far as the right to recover for the wall is concerned, into a definite and distinct personal right of action in the builder of the wall, subject only to the condition precedent that it be made use of by the adjoining owner or his successor in interest.

5. There is, of course, this difference, that in the cases referred to in the text the right of action for rent or damages for breach of any other covenant is a definite unconditional right against a definite individual, an assignee of the tenant not being liable for any breach prior to the assignment to him, while a subsequent owner of the adjoining tract will be the person liable to pay for the party wall, provided he make use of the wall after the conveyance to him. But this does not alter the principle

involved. The builder's right to recover for the wall is as distinctly personal as is the landlord's right to accrued rent. It differs only in that it is contingent upon the making use of the wall by the adjoining owner or his grantee. A case more nearly parallel would be the landlord's obligation to pay for improvements erected by the tenant or his assigns during the term, under a covenant to that effect, the tenant having made improvements and having subsequently assigned the term. His personal right of action to recover therefor against the landlord or his grantee would not pass to the assignee of the term, though the covenant would run with the land so as to bind the landlord or his grantee in favor of the assignee of the term for improvements erected by such assignee. See § 301, note 11, *ante*.

entirely the property of the builder, he having an easement to have it supported in part on the neighbor's land, so that he alone is liable for damages arising because of the dangerous condition of the wall, due to defective construction, or the like, title passing to the neighbor to his part of the wall upon his using and paying for it.⁶ This would seem to be a question of what the intention was in each case, turning on the terms of the agreement under which the wall was erected. It has been urged in at least one case that in this situation the grantee of the purchaser is entitled to payment for one-half of the wall from the adjoining owner upon his making use of it, not as assignee of a covenant running with the land, but as vendee of so much of the wall.⁷

§ 304. Covenants in Equity.—Negative covenants or agreements restricting the use of land of such character that equity will compel their specific performance by granting an injunction restraining their breach will be enforced against a grantee taking with notice of the restrictions though the covenants so enforced would not run with the land at law. The practical result is that they qualify the title of any purchaser taking with notice, though no easement or other incorporeal right exists affecting the legal title of the land involved. Since the purchaser takes with notice of the equity existing in the covenant he takes subject to it, and must abide by its terms.¹ Heirs, devisees

6. *Mickel v. York*, 175 Ill. 62; *Gorham v. Gross*, 125 Mass. 232; *Brown v. McKee*, 57 N. Y. 684; *Mason's App.*, 70 Pa. St. 26; *Sullivan v. Graffort*, 35 Iowa 531; *Glover v. Mersman*, 4 Mo. App. 90.

7. *Gibson v. Holden*, 115 Ill. 199, 206. How a subsequent purchaser of the land from the builder of the wall can be regarded as a vendor, the right of the adjoining owner being an absolute under the law, and the

party wall to which such subsequent purchaser was not a party, is difficult to understand. If he purchased the land and paid for it on the basis of his collecting the amount subsequently to become due for the wall, an assignment of the builder's rights thereto would be clearly implied.

1. *Tulk v. Moxhay*, 2 Phil. 774; *Whitney v. Union Ry. Co.*, 11 Gray (Mass.) 359; *Lewis v. Gallner*, 129 N. Y. 227; *Winfield v. Henning*, 6 C.

and grantees who have paid nothing for the property take subject to the equity of specific performance, and are, therefore, subject to the enforcement of such covenants, though they take without notice.²

It is quite immaterial in equity whether such a covenant or agreement runs with the land at law or not. In either case it will be enforced if it is of such character that equity will decree its specific performance. This is obviously a branch of the law of specific performance of contracts, but because of the incidental effect of such covenants on titles the law governing them constitutes an important part of the law of real property. Such a covenant or agreement may be enforced by a grantee, heir or devisee of land retained by the covenantor if made for the benefit of such land, touching or concerning its use or enjoyment so as to add to its value, though not of such character as to run with the land at law either as a benefit or burden.³

E. Green (N. J.) 188, and cases in notes following.

In *Whitney v. Union Ry. Co.*, 11 Gray 359, 363, the court explains the principle involved in these cases as follows: "Upon this point (viz., the enforcement of restrictive covenants against those deriving their title from the grantee), the better opinion would seem to be that such agreements are valid, and capable of being enforced in equity against all those who take the estate with notice of them, although they may not be strictly speaking real covenants, so as to run with the land, or of a nature to create a technical qualification of the title conveyed by the deed. The opinion rests on the principle that, as in equity that which is agreed to be done shall be considered as performed, a purchaser of land, with notice of a right or interest in it, subsisting in another, is liable to

the same extent and in the same manner as the person from whom he made the purchase, and is bound to do that which his vendor had agreed to perform. Therefore an agreement or covenant, though merely personal in its nature, and not purporting to bind assignees, will nevertheless be enforced against them, unless they have a higher and better equity as *bona fide* purchasers without notice. * * * It is not binding on him merely because he stands as an assignee of the party who made the agreement, but because he has taken the estate with notice of a valid agreement concerning it, which he cannot equitably refuse to perform."

2. See cases in preceding note, also in notes following.

3. *Renals v. Colishaw*, 9 Ch. Div. 125, 11 Ch. Div. 866 (the court holding, however, that the benefit of the covenant did not run with the adjoin-

Those restrictive covenants which restrict one parcel of land for the benefit of land retained by the grantor are in effect grants creating easements, and the law applying to easements will control every such case. The great majority of so called restrictive covenants are of this nature, and require no additional consideration here. Thus where the grantee accepts a deed with a covenant restricting him from building on the property, or requiring him to build with a set-back of a stated number of feet from the street, or in

ing land because it was not shown to have been made for the benefit of that land, or some part of it); *Spicer v. Martin*, 14 App. Cas. 12, 23, 24.

In *Rogers v. Hosegood*, 2 Ch. 388, 407, Collins, L. J., said: "But when, as here, it (viz., a restrictive covenant) has been once annexed to the land reserved, then it is not necessary to spell an intention out of the surrounding facts, such as the existence of a building scheme, statements at auction, and such like circumstances, and the presumption must be that it passes on a sale of that land, unless there is something to rebut it; and the purchaser's ignorance of the existence of the covenant does not defeat the presumption."

In *De Gray v. Monmouth Beach, etc. Co.*, 50 N. J. Eq. 329, 335, the court said: "The right of the owner of a lot of land to enforce a covenant restrictive of the use of another tract, which covenant has been entered into by an owner of such other tract with the former owner of both, but has not been expressly assigned, depends primarily on the covenant having been made for the benefit of land embracing said lot. If it has been so made the benefit of the covenant enures to subsequent purchasers of the land." See, also, cases il-

lustrating restrictions made as part of a general plan or scheme in a real estate development, note 6, *post*.

Just on what principle the benefit runs with the land benefited in these cases is not explained very clearly by the courts, assuming a case in which the covenant would not so run at law. There is no difficulty when an easement is created, the covenant amounting to a grant or reservation thereof in express terms, or where the covenant runs with the land at law, in support of an easement existing or created between the two parcels involved. But in the case of a mere parol agreement, or one implied from circumstances attending the sale, restricting the parcel sold for the benefit of the parcel retained, why should the subsequent purchaser of the parcel so retained or of part of it get the right to enforce this restriction of which he may have known nothing? The answer is that the specific enforcement of the agreement by equity requires its enforcement in favor of the land to be benefited thereby, as the parties intended, not in favor of the promisee personally, and therefore the subsequent owner of such land acquires with it the right to enforce the restriction, though it would be entirely void at law.

any other way restricting him in the erecting of buildings on the premises conveyed, or restricting him in the use of the property, for the benefit of land retained by the grantor, the restrictions are easements in favor of the dominant estate of the grantor and enforceable by him or his assigns against the grantee of the servient estate and his assigns.⁴

The most important class of covenants or agreements enforceable in equity only arise in conveyances of lots or plots as part of a real estate development, uniform restrictions being made in each deed for the mutual benefit of all the purchasers. If these restrictions are contained in the deeds conveying the lots they create easements in favor of the lots remaining undisposed of, which are benefited thereby, and as those lots are thereafter conveyed each subsequent purchaser acquires with his lot as appurtenant thereto the restrictive easements so created.⁵ But the restrictions are intended in such case for the benefit of prior as well as subsequent purchasers. It is apparent that they cannot be enforced by prior purchasers as easements, since they were created after these purchasers had acquired their lots. Nevertheless, if the restrictions are clearly part of a common scheme or plan for the mutual benefit of all purchasers, the restrictions being clearly for the benefit of the land already sold as well as for the benefit of the land remaining with the real estate operator, a reciprocal agreement is implied that the land retained shall be subject to the same restrictions as the land so conveyed, and each subsequent purchaser of other lots, taking with notice of the general scheme, will be bound to abide by them as fully as

4. *Peck v. Conway*, 119 Mass. 546; *Conn.* 242; *Watrons v. Allen*, 57 Mich. Brown v. O'Brien, 168 Mass. 484; 362.
Chase v. Walker, 167 Mass. 293; 5. See cases in preceding note, also
Phoenix Ins. Co. v. Continental Ins. Linzee v. Mixer, 101 Mass. 512; *Parker v. Nightingale*, 6 Allen (Mass.)
Co., 87 N. Y. 400; *Post v. Wiel*, 115 341; *Barrow v. Richard*, 9 Paige Ch.
N. Y. 361; *Columbia College v. Lynch*, (N. Y.) 351; *Gould v. Partridge*, 52
70 N. Y. 440; *Hutchinson v. Ulrich*, App. Div. (N. Y.) 40; *Winfield v.*
145 Ill. 336; *Clark v. McGee*, 159 Ill. Henning, 21 N. J. Eq. 188.
518; *Collins Mfg. Co. v. Marcy*, 25

though they had been created as easements by express grant. This implied agreement is not in writing — in fact it usually arises from representations and from physical conditions indicating the existence of the general plan,— and therefore it is not even a covenant, much less a grant of an easement. But the lot was sold to the prior purchaser under this agreement, implied in fact, or perhaps expressed by parol, that the remaining land be restricted in accordance with the general plan. Equity will specifically enforce this agreement by enjoining any breach thereof, not only as against the original owner of the land who made the agreement, but also as against any subsequent purchaser of the remaining land taking with notice of the general scheme, and therefore of the agreement affecting the land sold to him. He takes with notice of the prior purchaser's equitable right to specific performance of the restrictive agreement, express or implied, and he is subject thereto as completely as his grantor who made the agreement.⁶ To be subject to specific performance the agreement must not be personal, but must relate to the land restricted, of such a nature that pecuniary damages would not be an adequate remedy.⁷ It hardly need be added that such an agreement does not run with the land, either at law or in equity, in the sense in which the covenants discussed in the foregoing sections run with the land. It is simply and solely a question of the specific performance of a negative restrictive agreement as against a subsequent purchaser of the land with notice.

6. *Tulk v. Moxhay*, 2 Phil. 774; *Beach Co.*, 50 N. J. Eq. 329; *Whitney v. Union Ry. Co.*, 11 Gray (Mass.) 359; *Linzee v. Mixer*, 101 Mass. 512; *Hosegood*, 2 Ch. 388; *Tallmadge v. Hutchinson v. Ulrich*, 145 Ill. 336; *East River Bank*, 26 N. Y. 105; *Columbia College v. Lynch*, 70 N. Y. 440; *Barrow v. Richard*, 9 Paige (N. Y.) 351; *Winfield v. Henning*, 21 N. J. Eq. 188; *De Gray v. Monmouth*

7. See cases in preceding note.

Where a purchaser of several lots in a single parcel subject to a general plan of the kind above described, subsequently sells the lots to different purchasers who take with notice of the restrictions under the plan, these purchasers may enforce the restrictions against one another for the same reasons and on the same principle.⁸ No easement enforceable at law exists between them, in the absence of express restrictions in the deeds by which they take, because the restrictions reserved in favor of the entire parcel could not be enforced as easements in favor of one part thereof against another.

An agreement that the restrictions shall be binding and enforceable between the purchasers of the different parts and the vendor as owner of the remaining parts will necessarily be implied in such case, which will be specifically enforced against or in favor of either party to the conveyance in each case, and against or in favor of their successors in interest who are not purchasers for value and without notice.

The successor in interest of any such purchaser in this and the preceding cases may enforce these restrictions against the other purchasers. The restriction implied from the facts is for the benefit of his lot as against the other lots, and passes with it to his heir, devisee or grantee. Equity treats the implied restriction as though actually made in legal form, and it runs with the dominant estate just as it runs *against* the servient estate.⁹

In all of these cases it must be shown affirmatively that the restrictions are part of a common scheme of development, intended for the mutual benefit of the property purchased under its terms.¹⁰ If it appears that all the land is to be sold, more being held in reserve for the permanent use

8. *Winfield v. Henning*, 21 N. J. Eq. 188.

9. *Winfield v. Henning*, 21 N. J. Eq.

188. See note 3, *supra*, and cases in note 6, *supra*.

10. See cases in notes 6 to 9 preceding.

of the common vendor, a strong, though not conclusive, inference arises that mutual restrictions for the common benefit of all purchasers was intended.¹¹ It is a question of fact to be determined from the evidence in each case, such restrictions being enforceable only by the original vendor as personal covenants or agreements where it appears that they were introduced solely for his benefit in order that he might control the development, with the right to release or modify them at any time.¹²

Any restrictive covenant which obviously benefits adjoining property retained by the grantor will be treated as having been made for the benefit of such property, and as appurtenant thereto, though it is not expressly referred to.¹³

A restrictive covenant which runs with the land at law or creates an easement may be enforced both at law and in equity. But restrictive covenants which for any reason are unenforceable at law either as easements or as covenants running with the land, can be enforced against assignees only in equity. In addition to the more usual cases of mutual restrictions in real estate developments heretofore discussed, there are many other instances of such covenants

11. *Nottingham, etc. Co. v. Butler*, 16 Q. B. D. 778. In *In re Birmingham and District Land Co.*, 1 Ch. 342, 349, the court said: "I take the same view as Mr. Justice Wills that it is a question of fact, to be deduced from all the circumstances of the case, whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common advantage of the several purchasers. * * * Though the retainer by the vendor of some part of the property is a highly important element, it is after all only an element to be taken into consideration

along with other circumstances in ascertaining the intention."

12. *Sharp v. Ropes*, 110 Mass. 381; *Dana v. Wentworth*, 111 Mass. 291; *Hamlen v. Keith*, 171 Mass. 77; *Clapp v. Wilder*, 176 Mass. 332; *Equitable Life Ins. Soc. v. Brennan*, 148 N. Y. 661; *Mulligan v. Jordan*, 50 N. J. Eq. 363; *Clark v. McGee*, 159 Ill. 518; *Hutchinson v. Thomas*, 190 Pa. St. 242.

13. *Peck v. Conway*, 119 Mass. 546; *Tobey v. Moore*, 130 Mass. 448; *Phoenix Ins. Co. v. Cont. Ins. Co.*, 87 N. Y. 400; *Muzzarelli v. Hulshizer*, 163 Pa. St. 643; *Electric City Land Co. v. West Ridge Coal Co.*, 187 Pa. St. 500.

or agreements enforceable only in equity by specific performance in favor of or against successors in title to the original parties. Thus if a lessee sublets for part of the term, the subtenant is not bound by the covenants contained in the original lease.¹⁴ But he will be enjoined from committing any breach of a restrictive covenant contained in that lease of which he has notice; having taken the land with notice of a restriction which equity would enforce against the tenant, he as subtenant will be bound in the same way.¹⁵ It has been held that equity will enforce such a covenant against one who is a mere occupier with notice.¹⁶

A covenant on the part of the grantee of land not to use the land in a business which would compete with the business carried on by the grantor on land retained by him has been held to be enforceable against a subsequent grantee of the land, with notice of the restriction, it being a negative covenant or agreement which equity will specifically enforce as against the covenantor, and also as against a purchaser from him with notice.¹⁷ In other cases it has been decided that the covenant cannot be enforced by a subsequent owner of the parcel intended to be benefited because the benefit does not directly touch or concern that parcel, being of benefit to it only in an indirect way by preventing competition with the business conducted thereon.¹⁸ On

14. See § 178, *ante*.

15. See *Hall v. Ewin*, 37 Ch. Div. 74, though no injunction will be issued against the tenant, requiring him to take action against his subtenant, the tenant not being connected with the breach. See, also, *Ashby v. Wilson*, 1 Ch. 66.

16. *Mander v. Falcke*, 2 Ch. 554.

17. *Luker v. Dennis*, 7 Ch. Div. 227; *Hodge v. Sloan*, 107 N. Y. 244; *Bald Eagle Valley R. Co. v. Nittany Valley R. Co.*, 171 Pa. St. 284.

18. *Norcross v. James*, 140 Mass.

188; *Brewer v. Marshall*, 18 N. J. Eq. 337; *Kettle River R. Co. v. Eastern R. Co.*, 41 Minn. 461; *Tardy v. Creasy*, 81 Va. 553.

In *Nat. Bk. of Dover v. Segur*, 39 N. J. L. 173, an express covenant by the vendor not to engage in the banking business in Dover was held at law to run with the land which was sold for banking purposes, the court holding that this covenant did touch and concern the property conveyed, affecting its value directly for the purposes for which it was sold.

principle the cases of the first class are sound. The agreement is not intended to be personal, but for the benefit of the land retained by the covenantor, and equity should enforce it in favor of or against grantees of either parcel, the grantee of the parcel so burdened having taken title with notice.

In a New York case it appeared that one Gollner had purchased land in a residential section of Brooklyn, and announced his intention of erecting a seven story flat which would injure property owners in the neighborhood. They finally bought his land at an advance in price of \$6,000, he covenanting that he would not construct or erect any flats in the immediate neighborhood. Later he bought land across the street and began to erect a flat. He then transferred the property to his wife, continuing as her agent in the erecting of the flat. The court granted an injunction against the wife, holding that the contract not to erect a flat would be enforceable against Gollner by specific performance had the title continued in him, and as his wife took with notice it was also enforceable by injunction against her. Though the contract was not made with reference to any particular parcel of land, it attached to this parcel on Gollner's purchase of it as a restriction enforceable in equity.¹⁹

Where the character of the neighborhood has so changed that the specific enforcement of restrictive covenants or agreements would be inequitable in that it would involve a severe loss to the owners of the property restricted with little or no advantage to the property retained, equity will refuse to decree specific performance, leaving the parties to their remedy for damages, if any, at law.²⁰

19. *Lewis v. Gollner*, 129 N. Y. 227. This case illustrates how

board the principle involved in these cases is, and how far removed they are from cases of covenant running

with the land at law amounting to a legal qualification of the title.

20. Thus in *Trustees of Columbia College v. Thatcher*, 87 N. Y. 311, the court refused to specifically en-

In most instances covenants enforceable only in equity are negative restrictions calling for no positive affirmative act on the part of the owner of the servient property. In England the rule appears to be settled that negative restrictive covenants or agreements alone will be so enforced by specific performance.²¹ In the United States, however, it is well settled that the burden of a covenant made in support of an easement or quasi-easement runs with the land, though it calls for affirmative action, such as the making of repairs or improvements,²² and that in case of a breach relief may be had in equity as well as at law.²³ It would seem to follow

force a covenant forbidding the use of the land or buildings affected for business purposes, the character of the neighborhood having so changed since the covenant was made by the invasion of business houses and the building of an elevated railroad structure and the establishment of an elevated station near the property, as to render the property in question much less valuable for dwelling purposes, though fully maintaining its value if used for business purposes. The property having become unsuitable for dwelling purposes, it would be inequitable to enforce the restriction limiting its use to that purpose.

In *Jackson v. Stevenson*, 156 Mass. 496, a similar result was reached, the court saying: "If all the restrictions imposed in the deeds should be rigidly enforced, it would not restore to the locality its residential character, but would merely lessen the value of every lot for business purposes. It would be oppressive and inequitable to give effect to the restrictions; and, since the changed condition of the locality has resulted from other causes than

their breach, to enforce them in this instance could have no other effect than to harass and injure the defendant, without affecting the purpose for which the restrictions were originally made."

To the same effect, *Sayers v. Collyer*, 24 Ch. Div. 180, 28 Ch. Div. 103; *Ammerman v. Dean*, 132 N. Y. 355; *De Gray v. Monmouth Beach Club House Co.*, 50 N. J. Eq. 329, 335 (dicta).

21. Therefore a covenant to repair or to make improvements will not be specifically enforced in England. *Haywood v. Brunswick Bld. Co.*, 8 Q. B. Div. 403; *Austerberry v. Oldham*, 29 Ch. Div. 750; *Clegg v. Hands*, 44 Ch. Div. 53.

22. See § 302, *ante*, and cases therein cited and discussed.

23. In *Whittenton Mfg. Co. v. Staples*, 164 Mass. 319, after referring to cases holding that the burden of covenants in support of easements run with the land (see preceding note), the court said: "It has also often been held elsewhere * * * that the relief granted by a court of equity is not to be limited to those covenants which are merely restrict-

that any such covenant affecting the land of such nature that the remedy at law for damages is inadequate, will be enforced in equity against a purchaser with notice, though it does not run with the land at law.

ive, but will extend to covenants to do positive acts involving the expenditure of money," citing *Burbank v. Pillsbury*, 48 N. H. 475; *Kellogg v. Robinson*, 6 Vt. 276; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; *Bowen v. Peck*, 94 N. Y. 86; *Finley v. Simpson*, 2 Zab. 211; *Sparkman v. Gore*, 15 Vroom. 252; *Maynard v. Moore*, 76 N. C. 158; *Georgia South. R. v. Reeves*, 64 Ga. 492; *Conduitt v. son*, 2 Zab. 211; *Sparkman v. Gore*, nants (5th ed.), § 272, n.

CHAPTER XIX.

LICENSES.

§ 305. **Nature and Characteristics.**— A license is a mere permission to do an act or series of acts affecting the property of the licensor which would otherwise be wrongful, constituting trespass, waste or nuisance.¹ Thus permission to enter upon another's land for a stated purpose is a license which makes the entry lawful. Permission to close a right of way, to remove water pipes or to do any other act interfering with the use and enjoyment of an easement belonging to the person giving the permission in or over the land of the person to whom such permission is given, is a license, making lawful the act of interference which would otherwise constitute a nuisance.² So permission by a reversioner or remainderman given to a tenant for life or for years to do an act which would otherwise constitute waste is a license.³ A license is not an interest or estate in the land corporeal or incorporeal. It simply makes the act or acts which it permits lawful when without it such acts would be unlawful.

The distinction between a license and a tenancy for years has been discussed heretofore,⁴ as has been the distinction

1. In *Wood v. Leadbitter*, 13 M. & W. 838, the court quotes from Lord C. J. Vaughan in *Thomas v. Sorrell* (Vaughan 351), as follows: "A dispensation or license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which without it had been unlawful." * * * The court added: "A mere license is revokable; but that which is called a license is often something more than a license; it often comprises or is connected with a grant; and then

the party who has given it cannot in general revoke it, so as to defeat his grant, to which it was incident."

As to nature of licenses, see discussion in cases cited in notes following.

2. See § 295, *ante*, such licenses, when acted on, extinguishing or modifying the easement involved.

3. See § 67, *ante*, under *Waste*. *MacGregor v. Brown*, 10 N. Y. 114.

4. See § 144, *ante*, under *Landlord and Tenant*.

between an easement or other incorporeal interest in land and a license.⁵ The effect of a license to do an act on the land of the licensee blocking or interfering with the enjoyment of an easement belonging to the licensor, extinguishing or modifying the easement when the license has been acted upon, has been discussed in a prior chapter.⁶

Since a license is a mere personal privilege giving no interest in the land affected, it may be created by parol, the Statute of Frauds having no application,⁷ except that by statute in some jurisdictions a license to do an act which would otherwise amount to waste must be in writing.⁸ It may, for the same reason, be revoked at any time by parol, in so far as it has not been executed, even though created by a valid contract supported by a valid consideration. The one remaining question involving licenses belonging properly to the subject of this treatise is the question of whether executory licenses of this kind, for which a valid consideration has been given, will be specifically enforced by a court of equity, so that they cannot be revoked.

§ 306. Revocation of Licenses.—As stated above, licenses may, in general, be revoked at any time, constituting as they do in each case a mere personal authority or permission. But a license coupled with an interest in property situated on the land of the licensor cannot be revoked. Thus if A sell to B chattels situated on his land he cannot revoke the license which B has to enter and remove the chattels.⁹ So the sale of growing trees, crops, stone or minerals to be removed from a quarry or mine, if made in legal form, carries with it an irrevocable license to enter in each case, the license being coupled with an interest in the subject-matter of the contract which is to be removed.¹⁰ This,

5. See § 277, *ante*, under Creation of Easements.

6. See § 295, *ante*.

7. See § 277, *ante*.

8. *MacGregor v. Brown*, 10 N. Y. 114.

9. *Wood v. Manley*, 11 A. & E. 34; *Heath v. Randall*, 4 Cush. (Mass.) 195; *Rogers v. Cox*, 96 Ind. 157; *Browne*, Statute of Frauds, § 27.

10. *Pierrepoint v. Barnard*, 6 N. Y. 279; *Cool v. Peters B. & L. Co.*

however, is not an interest in the land; it merely frees the licensee from liability as a trespasser in case he enters to remove his property. If the owner of the land resists his entry in such case the licensee is not justified in overcoming such resistance by force; he must resort to his legal action to recover his property.¹¹ These questions belong properly to the subject of sales or torts, as the case may be, their discussion at this point being necessary only for the purpose of getting a clear conception of the nature of licenses in determining whether or not a mere license can ever be enforced as in the nature of an interest in the land.

It has been held in some states that a license for which a valuable consideration has been given will be specifically enforced as a permanent right in the licensee and his successors in interest, provided he has made expenditures by making improvements in acting on the license and in reliance upon its being continued, so that its revocation would result in an injustice to him.¹² The better view is that the

87 Ind. 531. See § 12, notes 4 and 5, *ante*, under Distinction Between Real and Personal Property.

11. *Churchill v. Hulbert*, 110 Mass. 42; *Willoughby v. R. R. Co.*, 33 S. C. 410.

12. In *Rerick v. Kern*, 14 S. & R. (Pa.) 267, permission to change the flow of a stream was given by the defendant, Rerick, so that it might become more valuable for use as water power to the plaintiff in the operation of a mill which he thereafter erected. In holding that by expending money in erecting the mill the plaintiff, Kern, acquired the right to have the flow of the stream continue as so changed, the court said: "A right under a license, when not specially restricted, is commensurate with the thing of which the license is an accessory. Permission to use water for a mill, or anything else

that was viewed by the parties as a permanent erection, will be of unlimited duration, and survive the erection itself, if it should be destroyed or fall into a state of dilapidation * * * But it is otherwise where the object to be accomplished is temporary. Such usually is the object to be accomplished by a saw-mill, the permanency of which is dependent on a variety of circumstances, such as an abundance of timber, on the failure of which the business necessarily is at an end. * * * With this qualification it may safely be affirmed that expending money or labor, in consequence of a license to divert a water course or use a water power in a particular way, has the effect of turning such license into an agreement that will be executed in equity."

To same effect, *Dark v. Johnston*,

license may be revoked in every such case unless the agreement amounted to a contract to grant an easement, or was an attempt to create an easement by parol, supported by a valuable consideration, and was so acted on by the licensee by the incurring of expenditures in making improvements in reliance thereon that justice requires its specific enforcement.¹³ A license, therefore, when not coupled with

55 Pa. St. 164; Cleland's App., 133 Pa. St. 189; Wilson v. Chaeftaut, 15 Ohio, 248; Buchanan v. Logansport R. Co., 71 Ind. 265; Decorah Woolen Co. v. Greer, 49 Iowa 490; Rhodes v. Otis, 33 Ala. 578. But see Wilkins v. Irvine, 33 Oh. St. 138.

13. In Watson v. Chicago M. & St. P. R. Co., 46 Minn. 321, the court said: "A licensee is conclusively presumed, as a matter of law, to know that a license is revocable at the pleasure of the licensor; and if he expends money in connection with his entry upon the land of the latter he does so at his peril. Any other doctrine would render most licenses irrevocable, and make them operate as conveyances of an interest in land. . . ."

"The principle upon which courts of equity sometimes apply the doctrine of equitable estoppel to cases where the entry has been under a license is that the conduct of the licensor has been such that it would be a fraud on the licensee to permit the licensor to deny that there was a contract for an interest in the land, and hence they treat the case as one of a parol contract partly performed, which the court will enforce."

In Crosdale v. Lanigan, 129 N. Y. 604, 610, the court, in sustaining the rule that licenses are revocable in all such cases, subject to the right of

equity to specifically enforce parol contracts for the grant of an easement, says: "This is plainly the rule of the statute. It is also, we believe, the rule required by public policy. It prevents the burdening of lands with restrictions founded upon oral agreements easily misunderstood. It gives security and certainty to titles, which are most important to be preserved against defects and qualifications not founded upon solemn instruments. The jurisdiction of courts to enforce oral contracts for the sale of land is clearly defined and well understood, and is indisputable. But to change what commenced in a license into an irrevocable right, on the ground of equitable estoppel, is another and quite a different matter."

This is the prevailing view, in England and in most of the states. Wood v. Leadbitter, 13 M. & W. 838; Cronkhite v. Cronkhite, 94 N. Y. 323; Wiseman v. Lucksinger, 84 N. Y. 31; Lawrence v. Springer, 49 N. J. Eq. 289; Morse v. Copeland, 2 Gray (Mass.) 302; Hodgkins v. Farrington, 150 Mass. 19; Nowlin L. Co. v. Wilson, 119 Mich. 406; Bridges v. Purcell, 1 Dev. & B. (N. C.) 492; Collins v. Marcy, 25 Conn. 239; Foot v. N. H. etc. Co., 23 Conn. 214; Thoenke v. Fielder, 91 Wis. 386; Batchelder v. Hibbard, 58 N. H. 269;

an interest, as explained in the preceding paragraph, may be revoked at any time; if such revocation amounts to a breach of contract the licensee has his remedy in an action for damages arising from such breach.¹⁴ But where something more than a license is intended, as where a parol contract to grant an easement has been made or where the parties have attempted to create an easement by parol, equity will specifically enforce the contract express or implied, where the person in whose favor the easement was to be created has proceeded to act under it, incurring expenditures on the faith of it so that justice requires its specific enforcement.¹⁵ In such case we have an easement enforceable only in equity, not a license. Since these interests are mere equities it follows that they cannot be enforced against a subsequent purchaser of the servient land without notice of the facts out of which the equity arises.

Tanner v. Volentine, 75 Ill. 624; Nat. Stock Yds. v. Wiggins Ferry Co., 112 Ill. 384, 391.

14. Wood v. Leadbitter, 13 M. & W. 838; Kerrison v. Smith, 2 Q. B. 445.

15. In Wiseman v. Lucksinger, 84 N. Y. 31, the court said: "There are, no doubt, many cases in which courts recognize an equitable title to an easement without a deed, but there

will be found in them either an express agreement for an easement, or an acquiescence or consent by conduct which has led to the erecting of permanent works or valuable and lasting improvements, or some other fact which would make the assertion of a legal title operate as a fraud on the person setting up the equitable right."

See § 277, notes 2 and 3, *ante*.

CHAPTER XX.

PUBLIC RIGHTS.

§ 307. **Highways and Streets.**—A highway is a right of way existing in favor of the public. Every member of the public has the right to use the way for the usual highway purposes, irrespective of his ownership of any land. It is therefore an easement in gross in the land included within the way, belonging to the public, and to each individual as a member of the public.¹

A highway is, however, much more than a mere public right of way. Some of the cases suggest a distinction between country roads and urban streets, asserting that the public's right in country roads is limited to passage in the usual ways on foot or by conveyance, including the driving of cattle and the transfer of commodities along the way, but excluding the use of the way for sewers, gas and water pipes below the surface,² while the right of the public in streets of cities and the more populous villages and towns includes these uses.³ The later cases recognize that this

1. The cases quite generally refer to the public right in highways as an easement, though it has been asserted by some judges and many text writers that it is in no true sense an easement, but rather a public right, the term "easement" being limited to rights in a servient estate in favor of a dominant estate. It is well settled, however, that easements in gross without a dominant estate, may exist as private rights (see § 276, *ante*), and it is difficult to see why the same term should not be applied to similar rights existing in the public. It will not do to call them servitudes, as every easement is a servitude from the standpoint of the servient estate.

They are in any event incorporeal rights in the land of individuals existing in the public of the same nature as private easements in gross.

2. *Bloomfield, etc. Co. v. Calkins*, 62 N. Y. 386 (dicta); *Van Brunt v. Flatbush*, 128 N. Y. 50 (dicta), since sewer was through town of Flatlands for the benefit of another town, Flatbush, which imposes an additional burden in any event; *Stirling's App.*, 111 Pa. St. 35 (involving same situation as preceding case); *Montgomery v. Santa Ana, etc. R. Co.*, 104 Cal. 186 (dicta); *Kincaid v. Indianapolis Nat. Gas Co.*, 124 Ind. 577.

3. *In re Yonkers*, 117 N. Y. 564; *Stondinger v. Newark*, 28 N. J. Eq.

distinction is untenable; that frequently city or village streets have developed from country roads with the growth of the community without any additional grant or dedication of rights to the public; that the right of the public is not limited narrowly to passage with its attendant incidents, but extends broadly to every reasonable public use to which the highway may be put in the public service which does not unreasonably interfere with rights of the owners of the land over which the highway exists, or with the rights of abutting owners where the public has acquired such land in fee.⁴ The exact limitations upon the rights of the public may best be considered in connection with the opposing rights of such owners.⁵

§ 308. Rights of Owners of Land Used as Highway in Relation to Rights of the Public.—Each owner of land

187; *affd. id.* 446; *Pierce v. Drew*, 136 Mass. 75; *Cone v. Hartford*, 28 Conn. 363; *McDevitt v. Peoples' Nat. Gas Co.*, 160 Pa. St. 367; *City of Quincy v. Bull*, 106 Ill. 337.

4. *Palmer v. Larchmont Elec. Co.*, 158 N. Y. 231 (the court saying: "But the owner of the fee in a country highway, taken, opened and dedicated for a public use, is entitled to no further compensation after the territory has become thickly settled and the highway has become a street of an incorporated city"); *Eels v. Am. Teleg. & Tel. Co.*, 143 N. Y. 133; *Pierce v. Drew*, 136 Mass. 75; *Julia Bld. Assn. v. Bell Telephone Co.*, 88 Mo. 258; *People v. Eaton*, 100 Mich. 208 (the court stating: "The restrictions upon this use are only such as are calculated to secure to the general public the largest practicable benefit for the enjoyment of the easement. When the highway is not restricted in its dedication to some particular mode of use, it is open to all suitable methods"); *Cater v.*

Northwestern Tel. Ex. Co., 60 Minn. 539 (the court saying: "As a matter of fact most of these uses (gas pipes, sewer, water pipes, etc.), were unknown when the public easement was acquired in many of the streets in the older cities. Indeed, many of what are now urban highways were merely country roads when the public acquired its easement in them * *

"In our judgment public highways, whether urban or rural, are designed as avenues of communication: and, if the original conception of a highway was limited to travel and transportation of property in movable vehicles, it was because these were the only modes of communication then known; that as civilization advances, and new and improved methods of communication and transportation are developed, these are all in aid of and within the general purpose for which highways are designed."

5. See the following section.

within the highway limits retains every right of ownership that does not interfere with the easement of the public.¹ He may, therefore, hold as a trespasser any person who enters on that part of the highway belonging to him for some purpose not within the public right, as a person who so enters to threaten him and create a disturbance,² or to hunt by shooting at game on either side of the road.³ He may sue in ejectment any person who has fenced in or encroached upon his land included within the highway, or any person or corporation seeking to appropriate it in part for some purpose not included within the public easement.⁴

The trees and grass growing within the lines of the highway are his,⁵ as are also the soil, stone and minerals beneath its surface. The public authorities may cut down trees and remove soil and stone in building and grading the road, or in subsequently repairing it, and the materials so taken may be used in grading and building any other part of the same road or other road or street included in the same general plan of improvement.⁶ But if they are taken and used

1. *Lade v. Shepherd*, 2 Stra. 1004; *Harrison v. Duke of Rutland*, 1 Q. B. 142; *Perley v. Chandler*, 6 Mass. 454, and cases in notes following.

2. *State v. Davis*, 80 N. C. 351.

3. *Bailey v. Jamieson*, 1 C. P. Div. 329. Other cases illustrating this rule are *Lewis v. Jones*, 1 Pa. St. 336 (deposit of fence rails on highway by defendant); *Thomas v. Ford*, 63 Md. 346 (similar deposit of wood, stone and rubbish); *Corleto v. Van Brundt*, 2 Johns. (N. Y.) 357; *Barclay v. Howell's Lessees*, 31 U. S. 498.

4. *Postal Tel. Co. v. Eaton*, 170 Ill. 513 (where telegraph poles and wires were held to add to the burden); *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447, and *Thomas v. Hunt*, 134 Mo. 392 (cases in which highways

had been discontinued, land reverting to owner of the fee who may maintain ejectment against those in possession); *Proprietors of Locks, etc. v. Nashua, etc. R. Co.*, 104 Mass. 1.

In *Cincinnati v. White*, 31 U. S. 431, the court held that ejectment would not lie because the plaintiff had no right of possession, which is in the public. The difficulty with this reasoning is that it disregards the plaintiff's right to use and enjoy the property in every way not interfering with the public easement.

5. *Makepeace v. Worden*, 1 N. H. 16; *Sanderson v. Haverstick*, 8 Pa. St. 294; *Daily v. State*, 51 Oh. St. 348; *Suffield v. Hathaway*, 44 Conn. 521; *Stretch v. Cassapele*, 125 Mich. 167.

6. *Higgins v. Reynolds*, 31 N. Y.

for any other purpose, the person who takes them is liable to the owner of the fee for their value.⁷

The owner of the fee, like everyone else, is guilty of a nuisance if he obstructs the highway by an encroachment, such as a bay window extending into the street,⁸ though he may erect gates or doors which swing into the street when opened, pile goods or other material in the street temporarily for the purpose of removal, provided no unreasonable obstruction of the way results and the removal is promptly made, and stop carriages or trucks on the street in front of his premises to receive or discharge passengers or goods, all of which, when done reasonably, are incident to his right to use the highway as abutting owner. In this respect his rights are the same whether the public has an easement only in the street or highway or owns the land in fee.⁹

If a highway or street is used by the public authorities or by a quasi-public corporation for a public purpose not reasonably included within the purpose of a street or highway, so that it constitutes an additional burden upon the servient estate, the owner must be compensated therefor. Whether or not such user amounts to an additional burden

151; *City of Aurora v. Fox*, 78 Ind. 1; *Rich v. Minneapolis*, 37 Minn. 423.

In *Suffield v. Hathaway*, 44 Conn. 521, the court held that the town had no right to take the water from a spring on the side of the road within the highway limits and to lead it to a watering trough for public use, as the owner of the fee had the exclusive right to the water from the spring, subject to the right of the public authorities to dispose of the water so as to prevent its injuring the road.

7. *Makepeace v. Worden*, 1 N. H. 16. See note 5, *supra*.

8. *Codman v. Evans*, 5 Allen (Mass.) 308.

9. *Callanan v. Gilman*, 107 N. Y. 360; *Welsh v. Wilson*, 101 N. Y. 254; *Mathews v. Kelsey*, 58 Me. 56; *Lippincott v. Lasher*, 44 N. J. Eq. 120; *Raymond v. Keseberg*, 84 Wis. 302, 309; *O'Linda v. Lothrop*, 38 Mass. 292; *Rafferty v. Central Traction Co.*, 147 Pa. St. 579.

See, also, *Original Hartlepool Co. v. Gibb*, 5 Ch. Div. 713; *People v. Horten*, 64 N. Y. 610; *Sherlock v. Bainbridge*, 41 Ind. 35; *Pallock v. Cleveland Ship Bld. Co.*, 56 Oh. St. 655 (involving the similar right of a riparian owner to stop his ship in navigable water for a reasonable time in loading or unloading).

depends, of course, on the extent of the public's right in a highway. We have already seen that streets and highways in the more populous communities carry with them the right in the public to put in sewers, water and gas mains beneath the surface without creating an additional burden.¹⁰

This holding has been sometimes placed on the narrow ground that these improvements are incident to the use of the highway as a way of passage merely, the sewers being available for the purpose of drainage, the gas mains for lighting, and the water pipes for flushing the streets. The same argument has been used to sustain the holding, on which the courts are agreed, that the poles and wires of an electric lighting company, installed in the streets with proper municipal authority, create no additional burden on the fee.¹¹ It is, of course, obvious that street improvements of this nature are never installed and never would be installed for any such purpose. The one moving and controlling purpose is the supplying of water, light and sanitation to all the people living along the streets or highways in question who desire to avail themselves of these advantages. The highways are used in these cases for the transfer of water, gas and electricity to the people of the community, just as they have been used for the transfer of coal, groceries or other commodities in the past. A different method of transfer is necessarily employed because of the nature of the commodities dealt with, but the principle is the same. It is as unnecessary as it is unreasonable and unprogressive to base these decisions on the relatively unimportant use of these improvements in the actual enjoyment of the streets for passage merely. The streets and highways are the means by which commodities of any kind are to be conveyed to the people, and this applies to gas, electricity and water as well as to other household necessities. The same

10. See § 305, *ante*.

v. People Natural Gas Co., 160 Pa.

11. Palmer v. Larchmont Elec. St. 367.

Light Co., 158 N. Y. 231; McDevitt

principle applies to sewers. The removal of sewage in this way may be accomplished much more effectively than by the wagons used over the highways in the past.¹²

This principle being understood, the difficulties presented by some of the cases which distinguish between country highways and city streets, as indicated in the preceding section, quickly disappear. The *right* to use the highway, whether in the country or city, for these purposes is always in the public whenever the occasion may arise as a result of the growth in population of the community involved.¹³

Telegraph and telephone lines and poles create an additional burden for which the owner of the fee is entitled to additional compensation according to the cases in several states, this user by quasi-public corporations, though of a public nature, being regarded as falling outside of a reasonable use of highways as such.¹⁴ But if one of the primary purposes of highways is to give to the public open and adequate means of intercommunication, whether in person, by messenger or by mail, a proposition about which there can be no doubt, it would seem to follow that the use of highways for telegraph and telephone lines, greatly furthering the means of communication between members of the public, is strictly within their original purpose interpreted with reference to these modern developments of social usage. The best considered cases hold that no additional burden

12. This broader and more comprehensive conception of a highway as the public's means of transfer and communication has been unmistakably expressed in the best considered of the later cases. See *People v. Eaton*, 100 Mich. 208 and *Cater v. Northwestern Telephone Co.*, 60 Minn. 536 (quoted from in note (4) under § 305, *ante*); *Pierce v. Drew*, 136 Mass. 75.

See, also, cases in notes immediately following.

13. See case, notes 3 and 4, § 305, *ante*.

14. *Eels v. Am. Teleph. & Tel. Co.*, 143 N. Y. 133; *Bashfield v. Empire St. Teleg. & Telep. Co.*, 18 N. Y. Supp. 250; *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507; *Chesapeake & P. Tel. Co. v. Mackenzie*, 74 Md. 36; *Daily v. State*, 51 Oh. St. 348.

arises from telegraph or telephone lines for which compensation to the owner of the fee need be made.¹⁵

It is well settled, for obvious reasons, that the use of a street or highway by horse, cable or electric cars adds no additional burden for which compensation to the owner of the fee need be made. It is a legitimate use of the streets in aid of the public right of passage.¹⁶ A New York case to the contrary is reactionary and unreasonable.¹⁷

A steam railroad built along or across a highway, on the other hand, creates an additional burden, and damages must be paid the owner of the fee.¹⁸ The true reason for this is not the fact that such roads carry freight as suggested by some of the cases. Indeed, one of the chief purposes of a highway is the transfer of produce and other commodities. The true reason is that the user is inconsistent with the use of the highway for the usual and ordinary purposes of passage on foot or with private vehicles, and is therefore

15. *Cater v. Northwestern, etc. Co.*, 60 Minn. 539, and *People v. Eaton*, 100 Mich. 208 (both quoted from in note 4, § 305); *Pierce v. Drew*, 136 Mass. 75; *Julia Bld. Assn. v. Bell Teleph. Co.*, 88 Mo. 258.

But see *Winter v. N. Y. and N. J. Tel. Co.*, 51 N. J. L. 83; *Broome v. N. Y. and N. J. Tel. Co.*, 49 N. J. L. 624.

16. *Hinckman v. Patterson Horse R. Co.*, 17 N. J. Eq. 75; *Atty-Gen. v. Met. R. Co.*, 125 Mass. 515; *El-liott v. Fair Haven, etc. R. Co.*, 32 Conn. 579; *Rafferty v. Central Tract Co.*, 147 Pa. St. 579; *Chicago, etc. R. Co. v. West Chicago, etc. R. Co.*, 156 Ill. 255; *Finch v. Riverside, etc. R. Co.*, 87 Cal. 597.

17. *Craig v. Rochester, etc. R. Co.*, 39 N. Y. 404, three of seven judges dissenting. When the land of the street or highway is owned in fee by

the public the courts of New York, as elsewhere, hold that the adjoining owner has no action for the building of surface lines. *Matter of Third Av. R. Co.*, 121 N. Y. 536. See, also, § 307, note 1, *post*.

18. *Williams v. N. Y. Central R. Co.*, 16 N. Y. 97; *Henderson v. N. Y. Central R. Co.*, 78 N. Y. 423; *Imlay v. Union Branch R. Co.*, 26 Conn. 249; *Grand Rapids, etc. R. Co. v. Heisel*, 38 Mich. 62; *Taylor v. Bay City St. R. Co.*, 101 Mich. 140; *Indianapolis, etc. R. Co. v. Hartley*, 67 Ill. 439; *Galt v. Chicago & N. W. R. Co.*, 157 Ill. 125; *Commonweath v. Allen*, 148 Pa. St. 358; *Onset R. Co. v. County Comm'rs*, 154 Mass. 395; *Chamberlain v. Elizabethport S. C. Co.*, 41 N. J. Eq. 43; *Lawrence R. Co. v. Williams*, 35 Oh. St. 168; *Gustavson v. Hanna*, 56 Minn. 334.

hostile to the purposes for which it was established. It imposes on the fee a much heavier burden, and interferes seriously with the owner's right of access to his land along the highway. Some cases hold, however, that even steam railroads may be built on streets and highways without additional compensation to the owner of the fee, provided that they do not in effect close up the street, unreasonably preventing its use by abutting owners.¹⁹

§ 309. Rights of Abutting Owners, Fee in Public.— If the public has acquired title to the land used for street or highway in fee, it may use the land for any public purpose which does not interfere unreasonably with the right of passage nor with the easements of light, air and access in the street which exist in favor of abutting owners. The building of an elevated railroad structure is such an interference as it unreasonably cuts off light and air and interferes with access to property abutting on the street. The permanent depreciation in value caused by these structures to abutting owners cannot be regarded as falling reasonably within the limits of the public right, and therefore was not paid for or allowed for when the land was taken or granted for street or highway purposes.¹

19. *Montgomery v. Santa Ana, etc. R. Co.*, 104 Cal. 186; *Sherlock v. Kansas City, etc. R. Co.*, 142 Mo. 172; *Knapp v. St. L. T. R. Co.*, 126 Mo. 26; *Cox v. Louisville, etc. R. Co.*, 48 Ind. 178; *Burkam v. O. & M. R. Co.*, 122 Ind. 344; *Fulton v. S. R. R. T. Co.*, 85 Ky. 640. See § 307, note 1, *post*.

Other illustrations of additional burdens are—the use of a street or square for a public market, *State v. Laverack*, 34 N. J. L. 201; the building of a stand pipe or water tower 15 feet in diameter and 135 feet high,

in the street, *Barrows v. Sycamore*, 150 Ill. 588.

On the general question, see *Lewia Eminent Domain*, § 91, 1; 2 *Dillon Municipal Corp.* §§ 704, 704-a.

1. *Story v. N. Y. Elev. R. Co.*, 90 N. Y. 122; *Bischoff v. N. Y. Elev. R. Co.*, 138 N. Y. 257; *Dolan v. N. Y. & H. R. Co.*, 175 N. Y. 367, 370; *Penn. R. Co. v. Duncan*, 111 Pa. St. 352. In *Fries v. N. Y. & Har. R. Co.*, 169 N. Y. 270, the court held that the defendant company could not be held for damages to an abutting owner arising from elevating its railroad

On the other hand abutting owners are not entitled to damages arising from surface street lines, the incidental interference with them in their use of the highway in connection with their property having been paid for when land for the street was taken by the public, or the right to cause such damage having been given when the land was dedicated to the public. There can be no recovery in such cases for damages arising from change of grade in building street car lines, provided there is no actual encroachment on the abutting owner's land, and provided the change of grade is reasonable in itself, and is made with reasonable care.² The same principle applies to any change of grade of streets

tracks because the change was ordered by state law, and further because the street had been used almost exclusively for the purpose of the railroad, so that the change added no additional burden other than that contemplated when the right to maintain the railroad in the street was acquired.

The use of streets for steam railroads gives abutting owners the right to recover damages arising from interference with their easement of light, air and access. *Chicago, etc. R. Co. v. Sturey*, 55 Neb. 137; *S. C. R. Co. v. Steiner*, 44 Ga. 546, 560. The public authorities may grant franchises to use streets for steam railroads, whether elevated or on the surface, the railroad company, not the municipality, being liable to abutting owners in case of damage arising from unreasonable interference with their right of access and use of the street. *Fobes v. Rome, etc. R. Co.*, 121 N. Y. 505; *Reiming v. N. Y. L. etc. R. Co.*, 128 N. Y. 157; *Kane v. N. Y. El. R. Co.*, 125 N. Y. 164; *Olney v. Wharf*, 115 Ill. 519; *C. N. & S. R. Co. v. Mayor*, 36 Iowa

299; *Hogan v. Central Pac. R. Co.*, 71 Cal. 83; *Sherlock v. Kansas City, etc. R. Co.*, 142 Mo. 172; *Decker v. Evansville, etc. R. Co.*, 133 Ind. 493. For cases where the fee of the street or highway is in the abutting owner see § 306, notes 18 and 19, *ante*.

Where the exclusive use of the street is taken for railroad purposes the abutting owner has a right of action for his damages. *Reming v. N. Y. L. etc. R. Co.*, 125 N. Y. 164; approved in *Muhlker v. N. Y. & H. R. Co.*, 173 N. Y. 549, 555; *Sherlock v. Kansas City, etc. R. Co.*, 142 Mo. 172; *Decker v. Evansville, etc. R. Co.*, 133 Ind. 493.

2. *Matter of Third Ave. R. Co.*, 121 N. Y. 536; *Rafferty v. Central Traction Co.*, 147 Pa. St. 579 (holding also that street car must wait if impeded by the vehicle of an abutting owner stopped at the curb in delivering or taking away passengers or goods); *Placke v. Union Depot R. Co.*, 140 Mo. 634; *Howe v. West End St. R. Co.*, 167 Mass. 46; *Detroit St. Ry. Co. v. Mills*, 85 Mich. 634. See, also, cases in note 16, § 306, *ante*.

made by the public authorities. If made reasonably and properly no liability is incurred to the abutting owner.³

The abutting owner's right to use the street or highway as a means of access, with the incidental right to place goods, building material and other personal property in the street for a short time in connection with the delivery or removal of same to or from the premises, and the right to stop vehicles in the street in front of his premises, are the same in the case of abutting owners who have title to the land of the street or highway in fee.⁴

§ 310. Right of Deviation in Public.—If a highway is impassable any person using the road has a license given him by law because of the necessity of the case to enter on the land of the abutting owner to the extent necessary to get past the obstruction. If the obstruction is one which may easily be removed so as to give a passage, or another public way exists by which the person using the highway may reasonably reach his destination, this license does not exist. In exercising this right he must enter only so far as is strictly necessary, and do as little damage as possible.⁵ The right does not exist in connection with private rights of way, except where the owner of the servient estate is responsible for the blocking of the way.⁶

3. *Radcliff's Exrs. v. Brooklyn*, 4 N. Y. 195 (the court mistakenly denying the existence of the natural right of support in any case); *O'Connor v. Pittsburgh*, 18 Pa. St. 187 (extreme case, as church building was rendered useless, the court criticising the rule); *Pontiac v. Carter*, 32 Mich. 164 (the court expressing clearly the basis of this rule, such incidental damage being paid for in the award on opening the street, or consented to if the street were dedicated by way of gift). Where an unreasonable grade is established by the changes, or the

change is made without reasonable care, the abutting owner may recover. *Arkon v. Chamberlain Co.*, 34 Oh. St. 328; *Cincinnati v. Whetstone*, 47 Oh. St. 196; *Roberts v. Chicago*, 26 Ill. 249.

4. See § 306, note 9.

5. *Campbell v. Race*, 7 Cush. (Mass.) 408; *Holmes v. Seely*, 19 Wend. (N. Y.) 507; *White v. Wiley*, 59 Hun (N. Y.) 618; *Irwin v. Yeager*, 74 Iowa 174.

6. *Williams v. Safford*, 7 Barb. (N. Y.) 309.

See § 294, *qnto*.

§ 311. **Creation of Highways and Streets.**—Highways and streets come into existence either by (a) dedication, (b) prescription, or (c) by condemnation proceedings under a statute authorizing their opening. Each of these methods will be separately discussed.

(a) *Dedication.* To constitute a valid dedication of land for a street, highway, park or other public use¹ there must be an offer to dedicate followed by an acceptance by the public. It may take the form of a grant to the municipality accepted by the proper public officials,² or of a map showing roads and streets subject to which lots or other subdivisions of the tract so mapped are conveyed,³ or it may consist of the mere opening up and improvement of the road or street for public use. Any action or conduct formal or informal, by which the owner offers the land for public use as a street, highway, park or the like is a valid offer to dedicate, provided that it clearly and publicly evinces his intent to dedicate his land to the use of the public.⁴ If the street or way

1. Land may be dedicated to any public use, as for school purposes, for a public cemetery, for a public dock, for parks or public squares as well as for highways or streets. See *Hunter v. Trustees, etc.*, 6 Hill (N. Y.) 407; *Cincinnati v. White's Lessee*, 6 Pet. (U. S.) 431; *Atty.-Gen. v. Farr*, 148 Mass. 309; *Abbott v. Cottage City*, 143 Mass. 521; *Price v. Plainfield*, 40 N. J. L. 608; *West v. Edson*, 18 Oh. St. 221; *Pittsburgh v. Epping, etc. Co.*, 194 Pa. St. 318. See *Pearsall v. Post*, 20 Wend. (N. Y.) 111, and *Post v. Pearsall*, 22 Wend. 425, holding *contra*, as to public wharf or dock. The better and prevailing view is expressed in *Atty.-Gen. v. Farr*, 148 Mass. 309, *supra*.

2. *Hughes v. Bingham*, 135 N. Y. 347 (holding that such a grant is valid, though the use of the highway

be limited to the winter months by the express terms of the deed). See *Marsh v. Fairbury*, 163 Ill. 401, and *Archer v. Salinas City*, 93 Cal. 43, stating that dedication may be by deed or other positive act accepted and taking effect at once.

3. *Bridges v. Wyckoff*, 67 N. Y. 130; *People v. Underhill*, 144 N. Y. 316; *Eckerson v. Haverstraw*, 6 App. Div. (N. Y.) 102; *Trustees, etc. v. Hoboken*, 33 N. J. L. 13; *Clark v. Elizabeth*, 40 N. J. L. 172; *Quicksall v. Philadelphia*, 177 Pa. St. 305; *Fossion v. Landry*, 123 Ind. 136; *Ruddiman v. Taylor*, 95 Mich. 547.

4. *Hayden v. Stone*, 112 Mass. 346; *Commonweath v. R. R. Co.*, 135 Pa. St. 256; *Wheatfield v. Grandmann*, 164 Ill. 250; *Huffman v. Hall*, 102 Cal. 26.

Acquiescence by the owner in the

is shut off by a gate or other obstruction, or is marked by a sign "private way," or if by any other means an intention not to dedicate to the public is shown, an offer to dedicate does not exist, no matter how much the public may make use of it, nor how valuable to the public it may be.⁵

The offer must be accepted by the public. This acceptance may be in the form of an express accepting or taking over of the streets, ways, squares, or the like, by the proper local authorities in behalf of the public, or by their acceptance of an express grant conveying them, or by the implied acceptance of them as public highways, streets, etc., through the repairing or improving of them as such, marking them with street signs, or in any other way clearly and unequivocally using them as public property.⁶ Mere use by the public for less than twenty years will not amount to such acceptance when unaccompanied by some such act of acceptance by the proper public officers, since a private person cannot impose on the town or city the burden and responsibility involved in caring for a public street or highway by

use of his land by the public, without circumstances showing intent to dedicate, such as the sale of lots subject to a map, the opening of a way for public use, or the expenditure of money in improving or repairing the way by the public authorities with the owner's knowledge and implied consent, will not amount to a dedication. *Herbold v. Chicago*, 108 Ill. 467; *Huffman v. Hall*, 102 Cal. 26; *Borough of Verona v. R. R. Co.*, 152 Pa. St. 368, and cases above cited in this note.

5. *Carpenter v. Gwynn*, 35 Barb. (N. Y.) 395 (gates generally maintained; removed while grading road); *Commonwealth v. Newbury*, 19 Mass. 51 (gates showed intent not to dedicate); *People v. Reed*, 81 Cal.

70; *State v. Green*, 41 Iowa, 693; *Bidinger v. Bishop*, 76 Ind. 244.

Payment of taxes on the land by the owner is some evidence of intent not to dedicate. *Rhodes v. Brightwood*, 145 Ind. 21; *Ottawa v. Yeutzer*, 160 Ill. 509.

6. *People v. Underhill*, 144 N. Y. 316; *Matter of Hunter*, 164 N. Y. 365, 367; *Holdone v. Cold Spring*, 21 N. Y. 474; *Booraem v. Ry. Co.*, 39 N. J. Eq. 465; *Riley v. Hammel*, 38 Conn. 574; *Hall v. Meridan*, 48 Conn. 416; *Hayden v. Stone*, 112 Mass. 346; *Chicago v. Drexel*, 141 Ill. 89; *Prescott v. Edwards*, 117 Cal. 298; *Du Bois Cem. Co. v. Griffin*, 165 Pa. St. 81; *Town of Fowler v. Linquist*, 138 Ind. 566; *White v. Smith*, 37 Mich. 290.

his mere act of opening it up, though followed by more or less general use by the public under the owner's license.⁷ Nevertheless where it is beneficial to the public an acceptance will usually be presumed from such public use continued for a considerable time, at least as against the owner. No fixed time is required. If the public user continues long enough to establish that the land has been taken by the public as a street or highway in fact as well as intent an acceptance has taken place and the dedication is complete without action by the authorities.⁸ A user of twenty years is not required. Such a user creates a public way by prescription.⁹

Before acceptance the offer may be withdrawn by the

7. *Booraem v. Ry. Co.*, 39 N. J. Eq. 465; *Point Pleasant L. Co. v. Crammer*, 40 N. J. Eq. 81; *People v. Underhill*, 144 N. Y. 316; *Holdane v. Cold Spring*, 21 N. Y. 474, and other cases cited in preceding note.

8. *State v. South Amboy*, 57 N. J. L. 252; *Hartford v. R. R. Co.*, 59 Conn. 250; *Atty-Gen. v. Farr*, 148 Mass. 309; *Holdane v. Cold Spring*, 21 N. Y. 474.

The differences in the cases on this question of acceptance is largely a difference in form of expression, rather than of substance. Where no formal acceptance by the proper public officials can be shown, and no acceptance on their part, by grading, improving or repairing the street or highway, is established, a user by the public under circumstances which clearly show an intent to dedicate in the owners and an intent of the general public to avail itself thereof, will amount to an acceptance, it being clearly established that the public has clearly and unequivocally made use of the land dedicated for

the purposes of the dedication. Where the user is equivocal, as consistent with a private easement as with a public way, no acceptance binding on the public will be found to exist. *Holdane v. Cold Spring*, *supra*; *Booraem v. Ry. Co.*, 39 N. J. Eq. 465; *Chicago v. Drexel*, 141 Ill. 89.

See cases in notes following, dealing with revocation of the offer to dedicate.

In the case of a street or highway, involving the incurring of expense and responsibility by the town or city, an acceptance from mere user will not be presumed, unless the user is such that the public convenience would be seriously interfered with by its interruption. The question is, can intent to accept be reasonably inferred, in this case as well as in the other cases above referred to? *Abbott v. Cottage City*, 143 Mass. 521; *Guthrie v. New Haven*, 31 Conn. 308; *State v. South Amboy*, 57 N. J. L. 252.

9. See note 14, *post*, under this section.

owner.¹⁰ But when the dedication has been completed by acceptance on the part of the public it cannot be revoked. The right of the public has then become absolute.¹¹

It is generally stated that dedication is founded on the doctrine of estoppel *in pais*.¹² Where land is granted to a city or town for public use, there is no doubt that title vests in the municipal corporation in trust for the public. Therefore where land is granted to a municipality in fee for a street or highway, it holds the legal title in trust for the public, and no question of estoppel can arise, any more than in the case of any other valid conveyance from one person

10. *Bridges v. Wyckoff*, 67 N. Y. 442; *Holdane v. Cold Spring*, 21 N. Y. 474; *Riley v. Hammel*, 38 Conn. 574; *Prescott v. Edwards*, 117 Cal. 298; *Chicago v. Drexel*, 141 Ill. 89; *Diamond Match Co. v. Ontonagon*, 72 Mich. 249.

In some cases the position seems to have been taken that where lots have been sold by reference to a map indicating streets, parks, squares, etc., the dedication cannot be revoked by the vendor, though not binding on the public until acceptance, though it may be revoked before acceptance if the private easements are all released or otherwise disposed of, the argument being that the private easement necessarily requires that the streets or highways be kept open to the general public. *Point Pleasant L. Co. v. Crammer*, 40 N. J. Eq. 81 (the court refusing to enjoin a public hackman from using such roads before acceptance); *Trustees v. Hoboken*, 33 N. J. L. 13; *Rhodes v. Brightwood*, 145 Ind. 21; *Bartlett v. Bangor*, 67 Me. 460; *Quicksall v. Philadelphia*, 177 Pa. St. 305 (the court holding that the grantor impliedly covenants that land in-

dedicated for streets shall be open to public use as such).

This right, however, exists in the vendees of the lots as incident to their private easements. As far as the public is concerned, the offer to dedicate may be withdrawn at any time before acceptance by the public in some form. *Prescott v. Edwards*, 117 Cal. 298; *Village of Vermont v. Miller*, 161 Ill. 210; *Diamond Match Co. v. Ontonagon*, 72 Mich. 249, and cases first above cited.

11. See cases in preceding note, also in notes 6 and 8, *ante*.

12. In *Hunter v. Trustees, etc.*, 6 Hill (N. Y.) 407, the court said: "Its effect (dedication) is not to deprive a party of title to his land, but to estop him, while the dedication continues in force, from asserting that right of exclusive possession and enjoyment which the owner of property ordinarily has. The principle upon which the estoppel rests is, that it would be dishonest, immoral and indecent * * * to reclaim at pleasure property which has been solemnly devoted to the use of the public * * * See *Flack v. Green Island*, 122 N. Y. 107; *Wilder v. St. Paul*, 12 Minn. 116.

to another. Where the grantor retains the fee in the land, conveying only an easement to the local municipal body, the same result follows, the municipal corporation taking the easement in trust for the public. Where there is no formal grant, but dedication by the physical opening of the street or highway, or by platting same on a map subject to which abutting property is sold, the dedication is complete on formal taking over of the streets or acceptance of the offer by the proper municipal authorities, though no money has been expended nor any actual change in position made which would justify the application of the doctrine of estoppel *in pais*. In fact the formal or informal dedication of land to a public purpose, completed by acceptance, seems to be an unusual method of conveying an interest in land, to which the Statute of Frauds has no application and in which a writing or other formal conveyance is not required. It stands of itself, without the need of appealing for support to the doctrine of estoppel.¹³

(b) *Prescription*. Highways, streets and other public rights of the same nature may arise by a prescriptive user on the part of the public for twenty years or more. As in the case of private ways by prescription the user must be open, continuous, uninterrupted and reasonably uniform, adverse, or without the license of the owner.¹⁴ The same

13. In *Hoboken Land & Imp. Co. v. Hoboken*, 36 N. J. L. 540, 547, the court said: "Although the doctrine of dedication is founded on principles which are peculiar, yet it will be seen on an analysis and comparison of the cases, that it differs from a grant only in the mode and the means by which a dedication is effected. Dedication is distinguished from a grant in that no special grantee need be in existence to accept the gift, and contrary to the rules of the common law, an interest in lands may thereby be

created without the intervention of the ordinary common law assurances. The intention of the donor may be gathered from his acts and declarations, resting only in parol. But when the intention is once ascertained, the character and scope of the dedication are as unalterably fixed as if the gift had been consummated by a formal instrument of grant."

14. *Jennings v. Tisbury*, 5 Gray (Mass.) 73; *Cohoes v. D. & H. Canal Co.*, 134 N. Y. 397; *Smith v. State*, 23 N. J. L. 130; *Wheatfield v. Grund-*

general principles that govern easements by prescription between private parties apply to public prescription. The cases base this doctrine on the fictitious presumption that the highway or street must have had some legal origin, either by dedication or by eminent domain, which is just as meaningless here as the similar presumption of a lost grant, advanced as the foundation principle of private easements arising by prescription, since the public easement arises though it be shown conclusively that it had no legal origin. It is better to put the doctrine on the same basis as prescription giving rise to private easements, viz.: the barring of the owner's right to sue members of the public after twenty years, by analogy to the Statute of Limitations as applied to actions to recover possession of land.¹⁵

(c) *Eminent Domain*. Streets and highways may be opened by condemnation proceedings under the power of eminent domain. The land or easement is taken in such cases for a public purpose, and full compensation must be made the owner, the cost of the opening being assessed on the property benefitted. The details of these proceedings are covered by statute in the different states, and the discussion of them is obviously outside the scope of this treatise.

§ 312. Extinction of Highways and Streets.—Statutes in the different states provide for the closing of highways or streets by taking the steps which the statute prescribes. Abutting owners in such cases are generally entitled to compensation for the damage incurred by them as a result of the closing.¹

Abandonment of the highway, established not only by non-user on the part of the public but also by user for in-

mann, 164 Ill. 250; Weiss v. South Bethlehem, 136 Pa. St. 294. See § 284, *ante*, as to private easements arising by prescription.

15. See § 284, *ante*, where this ques-

tion is discussed in its relation to private easements

1. 1 Elliott Roads and Streets, §§ 879-881; 15 Am. & Eng. Ency. of Law 396, Article by Prof. Tiffany.

consistent purposes long acquiesced in by the public, extinguishes the public easement exactly as similar abandonment extinguishes private easements. Mere non-user is evidence only of abandonment to be considered with other facts in determining whether or not the public has relinquished its right.² Some of the cases have based this rule on the presumption arising from such facts that the required legal steps had been taken some time in the past to legally close the highway.³ The so-called presumption means nothing, as it is very clear in most cases that no such steps were ever taken or ever contemplated. The principle underlying the rule does not seem to have ever been clearly expressed in the cases. Private easements are extinguished by abandonment because the owners of the servient estate is induced by the apparent abandonment of the easement on the part of the dominant owner to waive expense in improving or in otherwise making use of the land affected by the easement so that injustice would result to him in case the use of the easement should be renewed. The dominant owner is estopped from reasserting his right to the easement.⁴ The same principle is the basis for the extinction of the public's easement in a highway or street by abandonment. The servient owner is induced to enclose the highway, or

2. *Holt v. Sargent*, 81 Mass. 97; *Peoria v. Johnston*, 56 Ill. 45; *Knight v. Heaton*, 22 Vt. 480; *Bice v. Wolcott*, 64 Minn. 459; *Louisville, etc. R. Co. v. White*, 94 Ind. 257; *Larson v. Fitzgerald*, 87 Iowa 402; *Beardsley v. French*, 7 Conn. 125.

3. *Holt v. Sargent*, 81 Mass. 97; *Beardsley v. French*, 7 Conn. 125.

In most if not all of the cases, in addition to non-user for many years it appears that the servient owner fenced in and improved the highway, or part of it, or that subsequent purchasers of the land affected took title believing that the public easement

had been abandoned. All the elements of estoppel exist, therefore, in most of the cases, though the principle seems to have been rarely referred to as the basis for the rule.

In *Bice v. Walcott*, 64 Minn. 459, the court stated, after holding that a prescriptive adverse user could not run against the public, that the public may be estopped by acquiescence if any continued adverse user takes place and large expenditures are incurred in improving the property so held by the abutting owner.

4. See § 297, *ante*.

to build on it, or make some other use of it, incurring expense in so doing, because of the apparent abandonment of the easement by the public, justice requiring that the situation thus created be not disturbed thereafter by a reassertion of the public's right.⁵

The general rule is that the public's right will not be affected by mere adverse user. Therefore a prescriptive user of a highway for twenty years or more does not affect the public easement, unless an abandonment can be shown. The maxim "*Nullum tempus occurrit regi*" applies. The unlawful occupation or use of a public highway is a public nuisance, which will not be made lawful by any period of prescriptive user.⁶ In some states it is held that a municipal corporation is subject to the rules of prescription, treating it as a quasi-private corporation in holding title to streets and highways in behalf of the public, a position clearly unsound, since the ultimate right is in the public, not in the municipality.⁷ The tendency to confuse prescriptive user with abandonment is quite natural, but it is clear that the two doctrines are entirely distinct, resting on entirely different principles.

In several states statutes have been enacted that a highway shall be treated as abandoned if not opened up and

5. See note 3, *supra*.

6. *Driggs v. Phillips*, 103 N. Y. 77 (the court stating that unlawful occupation in such case is a nuisance for which no lapse of time would enable the owner to prescribe); *Hoboken, etc. Co. v. Hoboken*, 36 N. J. L. 540; *Commonwealth v. Moorehead*, 118 Pa. St. 344; *Bice v. Walcott*, 64 Minn. 459; *Wolfe v. Town of Sullivan*, 133 Ind. 331; *Heddleston v. Hendricks*, 52 Oh. St. 460; *Hoadley v. San Francisco*, 50 Cal. 265 (the court saying: "It cannot be conveyed to private persons and is effectually withdrawn from commerce,

and the city having no authority to convey the title, private persons are virtually precluded from acquiring it").

7. *Meyer v. Lincoln*, 33 Neb. 566 (citing leading cases on both sides of the question); *Big Rapids v. Comstock*, 65 Mich. 78; *Knight v. Heaton*, 22 Vt. 480 (last two cases may be sustained on theory of abandonment, as may most of the cases sustaining the doctrine of extinction by prescriptive user); *Town of Litchfield v. Wilmot*, 2 Root (Conn.) 288 (based on interpretation of a statute peculiar to Connecticut).

used as such within a stated time, usually five or six years after its establishment. If opened sufficiently so that it may be used for public travel the statute is sufficiently complied with, though much work remains to be done in order to put it in good condition.⁸ Similar statutes provide that failure to use a highway as such for a like period after it has been opened up will be an abandonment.⁹

On the extinction of the highway, either by proceedings under the statute or as the result of abandonment, title to the land remains in the original owners free and clear of the easement.¹⁰ Where title is taken in fee by the state or municipality there is some authority for the proposition that the fee is subject to the limitation that the land be used for the purposes of a street or highway, and if such user be given up or abandoned, title reverts to the original owner.¹¹

§ 313. Public Right of Navigation.—The public has the right to use for purposes of navigation all arms of the sea and streams in which the tide ebbs and flows, and also all streams which are in fact navigable. In England this right exists only in streams in which the tide ebbs and flows, most of the streams in that country being navigable in fact only to the extent that they are affected by the tide.¹ But in this

8. *Hovey v. Haverstraw*, 124 N. Y. 273 (within six years); *Pickford v. Lynn*, 98 Mass. 491; *Trotter v. Barrett*, 164 Ill. 262.

9. *Amsbry v. Hinds*, 46 N. Y. 57 (six years); *Mercer Co. v. Penn. R. Co.*, 45 N. J. L. 82 (five years); *Herrick v. Geneva*, 92 Wis. 114 (five years); *McRose v. Bottyer*, 81 Cal. 122 (five years); *Tiffany Real Prop.*, § 365.

10. *Thompson v. McCormick*, 136 Ill. 135; *Paul v. Carver*, 24 Pa. St. 207 (holding that the owner is entitled to no compensation since nothing is taken from him; there is

rather a surrender to him of the public right).

11. *Fairchild v. St. Paul*, 46 Minn. 540; *Gebhardt v. Reeves*, 75 Ill. 301 (holding that title reverts to the original owner, not the abutting owner, whose title extends only to outer line of street). *Contra*, *Pettingill v. Devin*, 35 Iowa 344. See, also, *Tift v. Buffalo*, 82 N. Y. 204, holding that the winding up of a turnpike Co. did not cause a reverter of the fee to the original owners, the road having been taken over as a public road.

1. The stream or channel, though

country, with its great lakes and rivers on which an extensive commerce is carried on, the test is whether or not the stream is navigable in fact. It is navigable if it is of such size and character that it can be used regularly for the purposes of transportation and commerce.² It is not "every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture."³ If the stream is such that it affords a channel for useful commerce it is a navigable stream, though it contain natural obstructions, such as rapids and sand-bars which render navigation difficult.⁴

affected by the tide, must be navigable in fact. "If it is a petty stream, navigable only at certain periods of the tide, and then only for a very short time, and by very small boats, it is difficult to suppose that it ever has been a public navigable channel. Bayley, J., in *King v. Montague*, 4 B. & C. 598, 602. See, also, *Commonwealth v. Vincent*, 108 Mass. 441, 447.

2. "The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters. There no waters are navigable in fact, or, at least, to any considerable extent, which are not subject to the tide. * * * But in this country the case is widely different. * * * Those rivers must be regarded as public navigable rivers in law which are navigable in fact." Field, J., in *The Daniel Ball*, 10 Wall. 557, 563; *Com. v. Vincent*, 108 Mass. 441; *Ad-*

ams v. Pease, 2 Conn. 481; *Brown v. Chadbourne*, 31 Me. 9; *Smith v. City of Rochester*, 92 N. Y. 473; *Eneminger v. People*, 47 Ill. 366; *Carson v. Blazer*, 2 Bin. (Pa.) 475, and cases in notes following.

3. *Rowe v. Granite Bridge Corp.*, 21 Pick (Mass.) 344.

4. *The Montello*, 20 Wall. 430. The public may use navigable streams for passage and transportation with any kind of craft. The right extends to and includes the right to float logs down a stream, if the stream is of sufficient size for the purpose at regularly recurring periods or seasons, to the extent, at least, of such logs as are cut from timber growing in territory from which the stream flows. *Brown v. Chadbourne*, 31 Me. 9; *Hooper v. Hobson*, 57 Me. 273; *Harold v. Jones*, 86 Ala. 274 (holding that a stream large enough for floatage purposes only in periodical seasons of high water, is a public highway during such seasons only); *Carter v. Thurston*, 58 N. H. 104; *Koopman v. Bloodgett*, 70 Mich.

The title to land under tidal waters below high water mark is in the state, the owners of the adjoining upland owning only to the high water mark.⁵ In some states, however, the shore, between high and low water marks, belongs to the owner of the upland,⁶ while in others he has the right to fill in and reclaim from the sea or stream land under water in front of his property, such land becoming his in fee.⁷ The great rivers of the country and the great lakes, forming important channels of commerce, are public waters of the state and nation, whether the tide flows in them or not, and title to the land thereunder is in the state, not in the riparian owners.⁸ But the beds of smaller streams in any state which have not been declared to be public waters, belong to the riparian owners to the thread of the stream, subject to the public right of navigation if the stream is in fact navigable.⁹ It does not follow, therefore, because a

610, 617 (the court stating that they cannot be used as public highways for floatage from all quarters, but only from the territory which they naturally serve); *Grand Rapids v. Powers*, 89 Mich. 94.

Logs which have been washed ashore may be reclaimed, the owner incurring no liability for damages to the riparian owner unless he does some unnecessary damages in removing them. *Carter v. Thurston*, 58 N. H. 104; *Forster v. Juniata Bridge Co.*, 16 Pa. St. 393. In *Sheldon v. Sherman*, 42 N. Y. 484, the court stated that if the owner of logs deposited along the shore enter to remove them, he must pay damages to the owner of the land so entered upon, but not if he abandons the logs. In Maine, by statute, the owner may reclaim his logs on paying damages. *Brown v. Chadbourne*, *supra*, statute, c. 67, § 11.

5. *Shively v. Bowlby*, 152 U. S. 1 (containing a review of the authori-

ties in the different states); *Sweringen v. St. Louis*, 185 U. S. 38; *Kean v. Calumet Canal Co.*, 190 U. S. 452.

6. *Litchfield v. Scituate*, 136 Mass. 39; *Lapish v. Bangor Bank*, 8 Greenl. (Me.) 85; *Clement v. Burns*, 43 N. H. 609, 621; Code, Virginia, ch. 101, § 5.

7. *Mather v. Chapman*, 40 Conn. 382; N. J. Revision, Wharves, §§ 1, 2, 8; *Providence Steam Eng. Co. v. Providence Steamship Co.*, 12 R. I. 348, 363.

8. See cases in note 5, *supra*, also *Benson v. Morrow*, 61 Mo. 345; *Ryan v. Brown*, 18 Mich. 196; *Lincoln v. Davis*, 53 Mich. 375; *Wood v. Fowler*, 26 Kan. 682; *Shrunk v. Schuylkill Navig. Co.*, 14 S. & R. (Pa.) 71; *Houghton v. Chicago R. Co.*, 47 Iowa 370.

In New York, the bed of the Hudson and the Mohawk belongs to the state. *Smith v. City of Rochester*, 92 N. Y. 473; *The Canal Appraisers*, 33 N. Y. 46.

9. *Smith v. City of Rochester*, 92

stream is navigable that title to the bed of the stream is in the state.

The right of navigation is simply the right of the public, and of every person as a member of the public, to use the stream as a right of way for the transportation of persons and property. In general its incidents are similar to the incidents of the use by the public of highways and streets. It involves, in addition to, or rather as incident to the right of passage, the right to moor boats and ships, to load and unload them, to remain at anchor at any point in the stream, and to do any other thing necessary or usual to navigation, just as highways may be used in a similar way in stopping, loading and unloading wagons or other vehicles of conveyance, provided the act of user does not unreasonably interfere with the rights of other persons in their rightful use of the stream.¹⁰ A user which unreasonably blocks navigation, or which unreasonably interferes with a riparian owner's right of access to the stream will constitute a nuisance, public or private, depending on whether the public right of navigation is obstructed or only the private right of a riparian owner.¹¹

N. Y. 473; *Ryan v. Brown*, 18 Mich. 196; *Eneminger v. The People*, 47 Ill. 366; *The People v. Platt*, 17 Johns. (N. Y.) 211; *Hooker v. Cummings*, 20 Johns. 90; *Com. v. Chapin*, 5 Pick. 199; *Adams v. Pease*, 2 Conn. 481.

10. Anonymous, 1 Camp. 517, note; *Orig. Hartlepool Co. v. Gibb*, 5 Ch. D. 713; *People v. Horton*, 64 N. Y. 610; *Harrington v. Edwards*, 17 Wis. 586; *Sherlock v. Bainbridge*, 41 Ind. 35; *Pollock v. Cleveland Ship Bld. Co.*, 56 Oh. St. 655.

11. See cases in last preceding note, also, *Cobb v. Bennett*, 75 Pa. St. 326; *Woodman v. Pitman*, 79 Me. 456; *Peoples' Ice Co. v. Excelsior*, 44 Mich. 229; *Milwaukee Gas Light Co. v. Schooner "Gamecock"*, 23 Wis. 144.

Where title to the bed of the stream is in the state, the riparian owner has a right of access to the stream as a highway, the reasonable exercise of which cannot be interfered with by any unreasonable exercise of the right of navigation by the public, as by mooring directly across his landing place for an unreasonable time. See cases cited in preceding notes, particularly *Orig. Hartlepool Co. v. Gibb*, 5 Ch. Div. 713. If his right of access is cut off, by a grant of the shore to a railroad company for its right of way, he is entitled to damages. *Rumsey v. N. Y. & N. Eng. R. Co.*, 133 N. Y. 79. See § 289. *ante*. The state may and frequently does grant land under water to the owner of the up-

§ 314. **Rights of Fishing.**—The public has the right to fish in the sea, arms of the sea and navigable rivers, title to the beds of which are in the state.¹ But where the bed of the stream belongs to the abutting owners the public has no such right, the abutting owners having the exclusive right to fish in waters flowing over their land.² In Massachusetts and the other New England states in which the owner of the upland has title to low water mark the public may fish in the water over the land between low and high water mark, the owner's title continuing subject to the public's right of navigation and fishing until such land is taken up by a dock or reclaimed.³ No right to enter on the land above high water mark accompanes this right, and any such entry will be a trespass.⁴

land that he may improve it by erecting docks, etc., subject to rights reserved in favor of the public to use docks so erected, and subject to the rights of the federal government in public waters. The grant can be made only to the owner of the upland. N. Y. Pub. Land Law, L. 1894, ch. 317, amd. by L. 1895, ch. 208, § 20.

1. *Warren v. Matthews*, 6 Mod. 73; *Weston v. Sampson*, 8 Cush. (Mass.) 347; *Hooker v. Cummings*, 20 Johns. (N. Y.) 90; *Arnold v. Mundy*, 6 N. J. L. 1; *Lincoln v. Davis*, 53 Mich. 375; *Sloan v. Biemiller*, 34 Oh. St. 492; *Carson v. Blazer*, 2 Bin. (Pa.) 475; *Turner v. Hebron*, 61 Conn. 175, 187.

2. *Albright v. Cortright*, 64 N. J. L. 330; *Holyoke Water P. Co. v. Lyman*, 15 Wall. 500; *Waters v. Lilley*, 4 Pick. (Mass.) 145; *Lincoln v. Davis*, 53 Mich. 375; *Beckman v. Kreamer*, 43 Ill. 447.

As to "great ponds" in Massachusetts, see *Slater v. Gunn*, 170 Mass. 509.

The state has the undoubted right to regulate fishing by laws binding on

private owners fishing in their own waters as on the public at large. *Parker v. People*, 111 Ill. 581, 589.

Private owners cannot interfere with the free passing of fish through the stream in either direction, since it would interfere with the right of fishing of other owners up and down the stream. *Commonwealth v. Chapin*, 5 Pick. (Mass.) 199, 202.

3. *Weston v. Sampson*, 8 Cush. (Mass.) 347; *Proctor v. Wells*, 103 Mass. 216; *Moulton v. Libbey*, 37 Me. 472; *Hogg v. Beerman*, 41 Oh. St. 81. This includes the right to go on the shore between high and low tide, when the tide is out, in order to take fish. *Packard v. Ryder*, 144 Mass. 440.

4. 3 Kent Com. 417; *Cortelyou v. Van Brundt*, 2 Johns. 357. The public's right to fish gives no right to attach weirs or other appliances to the shore, nor to dry nets or fish thereon. *Matthews v. Trent*, 75 Me. 594; *New England Trout, etc. Club v. Mather*, 68 Vt. 338; *Lincoln v. Davis*, 53 Mich. 375.

CHAPTER XXI.

DEEDS AND CONVEYANCES.

§ 315. **Common Law Conveyances of Title; (a) *Livery of Seisin and Grant***—The regular and usual method of conveying title to land at the early common law was by livery of seisin, or feoffment. Since the doctrine of seisin is the foundation of so much of the law of real property it has been necessary to treat this kind of conveyance fully in an early chapter of this work,¹ and therefore a further discussion of it may be dispensed with here. It should be remembered that it involved an actual physical delivery of the property by the feoffer to the feoffee generally followed by a "charter" or deed of feoffment which defined the estate which had been transferred by the livery of seisin. This deed transferred no title. It simply defined and limited the estate already transferred by the livery. This deed, or any other writing, was unnecessary until after the enactment of the Statute of Frauds, livery of seisin made in due form being sufficient, though the deed of feoffment was generally used. Every present freehold estate, in fee, in tail and for life, required livery of seisin in its creation. Incorporeal interests, involving no present right of possession and ownership of the land, such as easements, servitudes, remainders and reversions could not be transferred by livery, since there was nothing corporeal to deliver. They were created or transferred by the common law deed of grant, and were said to lie in grant, while present corporeal interests were said to lie in livery. Conveyance by livery of seisin rapidly fell into disuse after the Statute of Uses. It has long since become obsolete, and has been expressly abolished in many states.² On the other hand deeds of grant have not only

1. See Ch. III, *ante*.

2. Digby Hist. L. Real Prop. (5th ed.), 412; 1 Stim. Am. St. L., § 1470.

survived, but they have taken the place of livery of seisin, as under the modern law they may be and are generally used in the conveyance of present corporeal estates as well as of incorporeal interests.³

(b) *Leases* were used in creating estates for years, at will and for life. The nature and requisites of leases are discussed in the chapter on Landlord and Tenant.⁴ Where the lease created an estate for life livery of seisin was necessary, a life estate being an estate of freehold.⁵ It is, of course, obvious that a formal lease was not necessary in creating a life estate, though apparently the usual means employed for that purpose. Any conveyance of the land with livery in which words of inheritance did not appear was sufficient to create a life estate.⁶

(c) A *deed of release* was a conveyance to a person already in possession or having a vested estate in the property conveyed, as a conveyance by a landlord to a tenant for years in possession, or by a reversioner or remainderman to a tenant for life. Livery of seisin was not required in these cases because the releasee was already in possession, the deed of release being a conveyance to him of the future incorporeal interest of the reversioner or remainderman.⁷ A release to a tenant for years or at will before entry by him was void, since possession was necessary in order that he might become seised instantly as owner in fee on the delivery of the deed of release.⁸ Since the possession of a

3. As to the nature of deeds of grant at common law in creating or transferring incorporeal interests, see Co. Litt. 172a; 2 Bl. Com. 317. That grants have been extended in their use by the modern law so as to include conveyances of present corporeal interests of all kinds, taking the place of feoffment, see 1 Stim. Am. St. L. § 1470; N. Y. Real Prop. L., §§ 241-246; L. I. R. Co. v. Conklin, 29

N. Y. 572, 585; Ross v. Adams, 28 N. J. L. 160.

4. See Ch. VII, *ante*.

5. 2 Bl. Com. 317, 318; Digby, *id.* 413.

6. See § 80, *ante*, as to creation of estates in fee and for life.

7. 2 Poll. & Mait. (2d Ed.), 90, 91; Co. Litt. 273b, 274b.

8. Litt. §§ 460, 465; Co. Litt. §§ 270a, 270b, 273b.

tenant at sufferance is not rightful, a release to him was void.⁹ As explained in an earlier chapter¹⁰ a release by a joint tenant to his co-tenant was valid, the word "heirs" being unnecessary to transfer his interest in fee, each co-tenant as a member of the unity being seised in fee of the entire property, subject to his co-tenant's interest, which vests in him on the delivery of the release.

Easements, profits, rents and other incorporeal interests were extinguished by release to the owner of the land in which the incorporeal right existed, no question of the transfer of seisin being involved.¹¹ Dower, inchoate or consummate, liens and other incumbrances could also be extinguished in the same way.¹²

The modern quitclaim deed has been evolved from the old deed of release, and may be used to accomplish the same purposes. Like the deed of grant, however, it may be used to convey present corporeal estates to strangers as well as to release incorporeal interests to tenants in possession. The deed of release may be used to-day to accomplish any of the purposes for which it was used at common law, though the quitclaim deed has largely taken its place. However, the quitclaim deed is substantially the same thing when used to accomplish any of the purposes for which deeds of release were employed at common law.

(d) A *surrender* is the giving up of an estate for life or for years to the owner of the next immediate estate in reversion or remainder. The nature of surrenders or conveyances, the need of an instrument in writing under the Statute of Frauds in cases of express surrenders, the nature of surrenders by act or operation of law, and the incidents of surrenders generally are dealt with at length in the chapter on Landlord and Tenant, surrenders taking place, as a prac-

9. Co. Litt. § 270b.

10. See § 81, *ante*.

11. Co. Litt. § 280a; 2 Bl. Com.

324, 325.

12. As to release of dower, see §

111, *ante*.

tical matter, almost exclusively between tenant and landlord.¹³ Quitclaim deeds are now commonly used instead of the formal deed of surrender of the common law, operating in the same way, and being in effect deeds of surrender when so used. The estate surrendered must immediately precede the estate of the surrenderee, and must not be greater in quantum than his estate, so that it may merge therewith.¹⁴ The words "surrender, grant and yield up" is the phrase commonly used in deeds of surrender, though any language expressing the intent to surrender the preceding particular estate to the owner of the next estate in reversion or remainder will be just as effective.¹⁵

(e) *Fines and recoveries* were methods of conveying title to land by employing fictitious actions, the final judgment in the fictitious action vesting the title in the person in whose favor the fine was levied or the recovery suffered. They were used principally for the purpose of barring entails, and they are further discussed under Estates in Fee Tail.¹⁶ They have been generally abolished or have become obsolete.¹⁷

§ 316. Conveyances Under the Statute of Uses.—The revolutionary effect of this statute upon conveyancing has been considered in an earlier chapter,¹ as has its operation in permitting the creation of future executory estates by springing or shifting use.² Since the statute provided that all uses upon their creation should be converted immediately into legal estates, all that was necessary after the statute to vest in another a legal estate of any kind, present or future, in fee, for life or for a term of years, was to create in him a corresponding use, the statute immediately chang-

13. See §§ 185-187, *ante*.

14. Co. Litt. § 387b; 2 Bl. Com. 326.

15. Shepard v. Spaulding, 4 Metc. (Mass.) 416; Harris v. Hiscock, 91 N. Y. 340.

16. See § 84, *et seq.*, *ante*.

17. See § 86, *ante*, also Digby Hist. L. Real Prop. (5th ed.), 254.

1. See § 196, *ante*.

2. See §§ 251, 252, *ante*.

ing it into a legal estate. Therefore any conveyance operating under the statute vested in the grantee the legal title without entry by him or livery of seisin to him. The mere delivery of the deed had the same effect as feoffment with livery. As stated in an earlier chapter, though conveyances might be made by feoffment to a third party as trustee to uses, the statute operating to transfer the legal title instantly into the *cestui que use*, nevertheless deeds of bargain and sale, covenants to stand seised, and deeds of lease and release, were used almost exclusively as conveyances under the statute, since they transferred title to the grantee therein named without the interposition of a third party, and without resort to the cumbersome method of feoffment. These conveyances rapidly took the place of feoffments in conveying land *inter vivos*, feoffment with livery of seisin becoming in effect obsolete at an early date.³

A deed of bargain and sale was simply a recital of a bargain and sale of the land described therein, reciting a consideration, the bargain and sale for a consideration either actually paid or only recited in the instrument creating the use in fee, for life or for years in favor of the bargainee which the statute changed instantly into the corresponding legal estate. If no consideration of value was either actually paid or recited in the deed it was given effect as a covenant to stand seised provided the covenantee was a blood relative of the covenantor or his or her husband or wife as the case might be, equity giving effect to the covenant as creating a use in favor of the covenantee in such cases, and the statute operating at once to change it into a legal estate.⁴

In this way secret conveyances of present freehold estates in land could be freely made, without the notoriety incident to feoffments. To remedy this situation the Statute

3. See § 196, *ante*, Williams R. Fire Co., 9 Wend. (N. Y.) 611, and Prop. (17th ed.), 235-237. authorities therein cited; Williams *id.*

4. See § 196, *ante*; Rogers v. Eagle 234. ,

of Enrollments⁵ was enacted a few years after the enactment of the Statute of Uses, requiring the enrollment of deeds of bargain and sale, as public records, and making them void if not enrolled as so required. If a deed of bargain and sale was not enrolled it would nevertheless be given effect as a covenant to stand seised, which did not have to be enrolled, provided a blood relationship or a relationship of marriage, as above explained, existed between the parties.⁶

Deeds of lease and release came into use largely for the purpose of avoiding the effect of the Statute of Enrollments. A bargain and sale for a term of years did not have to be enrolled under the statute, and as a bargain and sale for a term vested the term in the tenant as completely as though he had entered under a common law lease, a deed of release from the grantor was all that was required to transfer to him the fee in possession. A lease, therefore, by bargain and sale followed by a release conveyed the title under the Statute of Uses as effectually as a bargain and sale, and was valid without enrollment.⁷ Deeds of bargain and sale and lease and release became the standard methods of conveying freehold estates in land, and so continued until the development of the modern statutory deeds, discussed in the following section.

As the Statute of Enrollments has not been regarded as in force in this country, deeds of lease and release were not required for any purpose and have been seldom used.⁸ Deeds of bargain and sale were freely used, and common law deeds, ineffective as such in the particular case because used in attempting to create a future executory estate void at com-

5. Stat. 27 Hen. VIII, ch. 16 (1535), requiring bargains and sales to be by deed duly enrolled in court.

6. See opinion of Chancellor Walworth, *Rogers v. Eagle Fire Ins. Co.*, 9 Wend. 611; *Williams R. Prop* (17th ed.), 235, 236.

7. Digby *Hist. L. Real Prop* (5th ed.), 366; also preceding note; *Williams R. Prop.* (17th ed.), 236-238.

8. *Rogers v. Eagle Fire Ins. Co.*, 9 Wend. 611, 640; *Jackson v. Dunsbagh*, 1 Johns. Cas. (N. Y.) 91; *Marshall v. Fisk*, 6 Mass. 24.

mon law, were given effect as deeds of bargain and sale, if a consideration of value had been actually paid, or recited in the instrument, or as covenants to stand seised if a relationship of blood or marriage existed between the parties.⁹

§ 317. The Modern Statutory Deed.—In England it is now provided by the Real Property Act, that all corporeal estates and interests may be conveyed by grant, exactly as incorporeal interests,¹ and by another statute a deed of release has been given the same effect as a deed of lease and release.² By these and other statutes in England the modern deed has been greatly shortened and conveyances simplified.³ In this country simple deeds of conveyance are generally expressly authorized, by which interests of all kinds, corporeal or incorporeal, present or future, may be freely conveyed.⁴ What are in form deeds of bargain and sale are still used. They operate exactly as do the statutory deeds, there being no difference or distinction between them except in mere form.⁵ Quitclaim deeds are the modern offshoot or development of the old deed of release, though the older form is substantially the same thing and is undoubtedly as effective as ever when used to accomplish any of the purposes for which releases were used at the common law. The quitclaim deed purports to convey only such title as the grantor has, containing no covenant of title, the grantor being under no responsibility in case his title proves defective. It is used most frequently, as was a deed of release or surrender at common law, to give up or release to

9. See last preceding note; also §§ 251, 252, *ante*.

A deed in the form of a release void for want of possession in the releasee was given effect as a bargain and sale if a consideration was either actually paid or merely recited therein. *Lynch v. Livingston*, 6 N. Y. 422; *Pray v. Pierce*, 7 Mass. 381.

1. Stat. 8 & 9 Vict., ch. 106, § 2 (1845).

2. Stat. 4 & 5 Vict., ch. 21.

3. See Stat. 44 & 45 Vict., ch. 41, and 45 & 46 Vict., ch. 39.

4. N. Y. Real Prop. L. §§ 241-246; *Stimson's Am. St. L.* § 1470; *L. I. R. Co. v. Conklin*, 29 N. Y. 572, 585; *Ross v. Adams*, 28 N. J. L. 170.

5. N. Y. Real Prop. L. § 246.

the grantee a future interest or a present limited estate for life or for years, or an outstanding right of dower, lien or other encumbrance upon the title of the grantee.⁶

Under the modern law, therefore, any deed which purports to transfer title to the land described therein is equally effective as a conveyance of the grantor's title, whether it be in the form of a common law deed of grant, a deed of bargain and sale, a deed of lease and release or of release or surrender merely, a quitclaim deed or a deed under the modern statutes. No matter what its form, if it purports to convey or release any transferable or releasable interest of the grantor it will be effective for that purpose, no matter what that interest may be. If the deed contains the usual covenants of title it is called a warranty deed, the covenants being contracts added to the deed constituting no part of it as a conveyance. In other words the grantor's title is conveyed just as effectually by any of these deeds without covenants, the covenants serving to give to the grantee a cause of action for damages in case of a defect in the grantor's title. In effect any of these deeds without covenants are quitclaim deeds, no covenants being implied in conveyances of land, and the grantor incurring no liability in case of a defect in his title. It is important to remember that if a purchaser does not expressly stipulate for a warranty deed in his contract of purchase he is entitled only to a quitclaim deed.⁷ On the other hand if he discovers defects in the title of his vendor which are not excepted in the contract, he may reject the title and refuse to complete the purchase, though only a quitclaim deed was to be delivered to him under the contract.⁸

6. *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253; *Wilhelm v. Wilken*, 149 N. Y. 447; *Kyle v. Kavanagh*, 103 Mass. 356.

7. *Emerick v. Hackett*, 192 N. Y. 162; *Kyle v. Kavanagh*, 103 Mass. 356.

8. *Wallach v. Riverside Bank*, 206 N. Y. 434.

A contract to convey the "right title and interest" of the vendor will require the vendee to accept the conveyance, though the title offered prove to be defective.

§ 318. **Form and Requisites of Conveyances.**—The provisions of the Statute of Frauds in England, and of similar statutes in this country, requiring that conveyances of land be in writing, have been sufficiently discussed in other parts of this work.¹ At common law all conveyances of freehold estates in land, whether by grant, deed of feoffment, or by deed of bargain and sale or lease and release under the Statute of Uses, were deeds under seal, taking the form either of indentures or deeds poll. An indenture was a deed executed in duplicate by both parties to the instrument, the grantor and the grantee, the two parts being written on the same piece of parchment, severed by indentations made through a word, phrase or symbol, so that either part could be identified by fitting the two parts together again. Each party received a duplicate executed by the other, so that it was in form as well as effect the deed of the grantee as well as of the grantor, binding him as well as the grantor to abide by the covenants therein. The term “indenture” was applied to it because of these indentations. A deed poll, on the other hand, was executed by the grantor only, as a single instrument, with a clean-cut edge instead of an indented one. The covenants therein contained were binding only on the grantor who executed it.² This distinction has long since ceased to exist, the grantee being now everywhere bound by covenants in a deed accepted by him, whether he joined in its execution or not, his act of accepting the deed binding him to abide by its covenants.³

That the grantee under a quitclaim deed will be protected as a purchaser for value without notice under the Recording Acts, see Ch. XXII, *post*.

1. See Ch. I and Ch. VII, *ante*.

2. Co. Litt. 229a; 2 Bl. Com. 295, 296.

3. Atlantic Dock Co. v. Leavitt, 54 N. Y. 35; Hagerty v. Lee, 54 N. J. L. 580; Midland R. Co. v. Fisher, 125 Ind. 19. A covenant of assumption of

a mortgage in a deed binds the grantee by acceptance, whether in the form of an indenture or a deed poll. Bowen v. Beck, 94 N. Y. 86.

The distinction between the two forms of deeds has disappeared in England; the grantee being now bound by covenants in a deed poll by acceptance. Stat. 8 & 9 Vict., ch. 106, § 5; Williams Real Prop. (17th ed), 183, 184.

The usual and essential parts of a modern deed are: (a) the premises, including the names of the parties and their places of residence, the date, which, however, may appear at the end of the deed, recital of the consideration and acknowledgment of its receipt, words of grant, gift, or other words expressive of an intent to convey and transfer the property, the description of the land conveyed by the instrument, by metes and bounds, and exceptions, if any, viz.: easements, liens or other existing encumbrances subject to which the conveyance is made. (b) Immediately after the premises follows the habendum clause, "to have and to hold," etc., the purpose of which is to define the estate which the grantee is to take and hold. Any special provision such as a reservation by the grantor of an easement, estate or other interest, or a declaration of trust should follow between the habendum clause and the recitals of execution of the instrument. These closing recitals, followed by the signature and seal of the grantor and his acknowledgment of his signature, complete the instrument. The covenants of title in a warranty deed immediately precede the closing recitals, following the operative or conveying parts of the deed.⁴

§ 319. Names of Grantor and Grantee.—The grantor's name must be stated in such form that he can be identified. An error in the name will not affect the validity of the deed if the name as given in the premises is sufficient to indicate and identify the person who executed it, though the name signed differs in some respect from the name of the grantor as recited in the instrument.⁵ A conveyance by a class of

4. Williams Real Prop. (17th ed.), 678-682; 2 Bl. Com. 298, *et seq.* correct); Erskine v. Davis, 25 Ill. 228, and Nicodemus v. Young, 90

5. Jenkins v. Jenkins, 148 Pa. St. 216 ("Jones" instead of "Jenkins," in clause of deed, signature correct); Houx v. Batteen, 68 Mo. 84 (mistake in last name of grantor in signature, recital in deed and acknowledgment stated, may be disregarded as forming no part of the name); Veit v. Schwob, 127 App. Div. (N. Y.) 171; Tustin v. Faught, 23 Cal. 237. The purchaser of real property, be-

persons, as by the "heirs" of a deceased person, will be valid, if the members of the class are existing persons whose identity can be readily ascertained, they having signed the deed in due form.⁶

A deed signed by several persons will operate as the deed of those only whose names are recited or whose identity is in some way indicated in the body of the instrument. Thus where a wife signs her husband's deed in order to bar or release her inchoate dower, it will be void for that purpose unless her name appear in the body of the deed as a grantor, or unless the instrument contain some recital of her release of dower to the grantee.⁷ It is obvious that where the deed is signed by one person only this is not necessary since by necessary implication he is the grantor.⁸

The same principles govern mistakes or omissions in the names of the grantees. If they can be identified by the names used as the persons to whom the property was intended to be conveyed, their title under the deed will be valid.⁹ But where they cannot be identified, as in the case of a conveyance to the heirs of a living person, the deed is void.¹⁰

fore accepting a deed of conveyance, may insist that the vendor's name be correctly stated therein, so that he may avoid the necessity of being forced to rely on parol evidence to establish his identity in order to sustain his title. But after accepting the deed he may, of course, prove the identity of the grantor in case a mistake was made in stating his name in any part of the deed. See *Peabody v. Brown*, 10 Gray (Mass.) 45; *Mau-pin Marketable Title*, 45.

6. *Beardsley v. Morse*, 75 Me. 542; *Shaw v. Loud*, 12 Mass. 447.

7. *Catlin v. Ware*, 9 Mass. 218; *Lothrop v. Foster*, 51 Me. 367; *Peabody v. Hewett*, 52 Me. 33; *Agr. Bk.*

v. Rice, 4 How. (U. S.) 225; *Batchelor v. Brereton*, 112 U. S. 396.

By statute in Illinois the execution of the deed by the wife, followed by a separate acknowledgment, is sufficient, though her name does not appear in the body of the instrument. *Johnson v. Montgomery*, 51 Ill. 185. See *Burge v. Smith*, 27 N. H. 332; *Krouska v. Janke*, 66 Wis. 252, *contra*.

8. *Jackson v. Root*, 18 Johns. (N. Y.) 60 (deed in the first person); *Elliot v. Sleeper*, 2 N. H. 525.

9. *Thomas v. Wyatt*, 31 Mo. 188; *Chase v. Palmer*, 29 Ill. 306. and cases cited in note following.

10. *Hall v. Leonard*, 1 Pick. (Mass.) 27; *Heath v. Hewitt*, 127 N.

When a deed is delivered with a blank left for the name of the grantee, it was void at common law, as authority to execute, and, therefore, to complete a sealed instrument by inserting the name of a party thereto, must be under seal.¹¹ In this country the same rule has been followed in a few cases.¹² In some states where seals have been abolished by statute, the grantee's name may be filled in and the deed is valid, it being held that this may be done by parol authority merely.¹³ In many states it is provided by statute that an agent's authority to execute a deed must be in writing, and in these states it follows that the grantee's name can be filled in only in cases where written authority to do so has been given.¹⁴

§ 320. Granting and Habendum Clauses; Consideration.

—Any words indicating an intention to convey the property are sufficient in the granting clause.¹ The term "grant"

Y. 166, and *Booker v. Tarwater*, 138 Ind. 385 (courts in last two cases stating that if "children" was meant by word "heirs," the deed would be good).

In *Huss v. Stephen*, 51 Pa. St. 282, a conveyance to a deceased person was held void for want of a grantee.

11. *Hibblewhite v. McMorine*, 6 M. & W. 200; *Shep. Touch.* 54.

12. *Burns v. Lynde*, 88 Mass. 305.

13. *Schwartz v. Ballou*, 47 Iowa 188; *Schintz v. McManany*, 33 Wis. 299; *Bell v. Kennedy*, 100 Pa. St. 215 (semble); *Field v. Stagg*, 52 Mo. 534 (not well considered).

In *South Berwick v. Huntress*, 53 Me. 89, the court takes the position that filling in the blank is not execution, and therefore does not come within the rule that an agent's authority to execute a sealed instrument must be under seal. This position is not sound, since the instru-

ment is void as a deed until the grantee's name is inserted. In *Chauncey v. Arnold*, 24 N. Y. 330, the court, by way of dictum, states that the agent's authority to fill blanks in a sealed instrument may be by parol. As the statute in New York expressly requires that an agent's authority to execute a conveyance of lands must be in writing, it would seem that this dictum is not law.

14. N. Y. Real Prop. L., § 242; *Lindsley v. Lamb*, 34 Mich. 509 (under statute similar to the N. Y. statute); *Upton v. Archer*, 41 Cal. 85; *Ayres v. Probasco*, 14 Kan. 175.

When the deed is delivered to a grantee without notice after being filled in by an agent with parol authority only, the deed is good by estoppel in any event. *Phelps v. Sullivan*, 140 Mass. 36; *Pence v. Arbuckle*, 22 Minn. 417.

1. *Lynch v. Livingston*, 6 N. Y. 422;

or "grant and release" or "give, grant, bargain and sell" are usual forms, one or the other of the first two of these expressions being used in the short form of deeds provided for by the English statute, the New York Real Property Law, and statutes of other states.² The necessity for using the word "heirs" in creating an estate in fee, and the word "heirs" followed by words of procreation in creating estates tail has been discussed at length in the sections dealing with the creating of estates in fee and in tail. The statutes in most states which have changed this requirement by providing that the entire estate of the grantor or deviser shall pass unless a lesser estate is expressly given by the terms of the deed or will are discussed and referred to in the same place.³

The granting clause and the habendum must be construed together unless they are necessarily inconsistent. Thus at common law if the granting clause was to A, simply, without words of inheritance, and the habendum was "to A and his heirs," an estate in fee passed. So a grant to A and his heirs, habendum to A and the heirs of his body created an estate tail, since the word "heirs" in the granting clause when construed with "heirs of this body" in the habendum, was evidently used in the sense of "heirs of his body." But a grant to A and his heirs, habendum to A for life, creates an estate in fee. The habendum cannot operate to cut down an estate expressly created by the granting clause.⁴ A conveyance to A and the heirs of his body, habendum to A and his heirs forever, created an estate tail at common law with a fee simple expectant on the termination of the estate tail.⁵ Where the estate limited by the habendum

Wilhelm v. Wilkin, 149 N. Y. 447;
Hummelman v. Mounts, 87 Ind. 178;
San Francisco R. Co. v. Oakland, 43
Cal. 502.

2. N. Y. Real Prop. L., § 258; Williams R. P. L. (17th ed.), 693. See statutes in the different states.

3. See §§ 80-83, *ante*.

4. See § 80, *ante*.

5. Co. Litt. 21a; Corbin v. Healy, 20 Pick. (Mass.) 514; the court saying (dicta): "Lord Coke says that where a person, in the premises of a deed, gives land to another and the

is greater than the estate provided for in the granting clause the habendum prevails. Therefore a grant to A for life, habendum to A and his heirs creates a fee simple.⁶ Under the modern statutes providing that the entire estate of the grantor shall pass in the absence of an express provision to the contrary in the deed, the principal question of construction of both granting clause and habendum is whether the deed expressly limits the estate conveyed to a life interest or other estate less than fee.⁷

The recital of a consideration, though usual, is not essential to the validity of a modern deed, whatever its form. A consideration was necessary to a conveyance of land under the old law in order to prevent a resulting use in favor of the grantor. The mere recital of a consideration, however nominal, was enough to repel the implication of a use and made the deed effective as a conveyance.⁸ A deed of bargain and sale required a consideration either actually paid or merely recited in the instrument without actual payment. We have seen that any deed, ineffective for any reason as a common law conveyance, was given effect as a deed of bargain and sale if any consideration, however nominal, was recited in the instrument, or actually paid.⁹ It was, therefore, very important prior to the enactment of the modern statutes that a recital of at least a nominal consideration should appear in every deed. But under the modern system of conveyancing now generally prevalent this technicality has no longer any reason for existence. Deeds of bargain and sale, deeds of grant and the modern statutory deeds are all placed on the same basis.¹⁰ Deeds of grant and of

heirs of his body, habendum to him and his heirs forever, he will take an estate tail, with a fee simple expectant. Co. Litt. 21a; Cruise's Dig. Tit. 32 Deed, c. 23, § 65."

6. Co. Litt. 21a, 299a; Goodlittle v. Gibbs, 5 B. & C. 709; Wood v. Taylor, 9 Misc. (N. Y.) 640; Bates v. Virolet,

33 App. Div. (N. Y.) 436; Meacham v. Blaess, 141 Mich. 258 (dictum).

7. Dorem v. Gillum, 136 Ind. 134; Riffin v. Love, 72 Ill. 553.

8. See chapter on Uses and Trusts.

9. See §§ 196, 251, *ante*.

10. See § 315. *ante*.

bargain and sale are made to operate exactly as the modern deed, requiring no consideration, either actual or merely by recital. The modern deed, whatever its form, no longer depends on the Statute of Uses. In fact uses have been generally abolished by statute.¹¹ In jurisdictions in which they still exist, actually or theoretically, the statutory deed, or the deed of grant as extended by statute, are just as effective to accomplish the purposes for which springing and shifting uses were employed, doing away with all need for distinguishing between these forms of conveyance.¹² Since a deed involves the transfer of title to land, and is in no sense a contract, there is no conceivable reason for a consideration as a legal requisite. It is obvious that the owner of land may convey it by way of gift, if he so desires, exactly as he may give away any article of personal property.¹³

Practical reasons for reciting a consideration are, 1st, that such recital gives rise to a presumption that value was paid therefor under the recording acts, and 2nd, a like presumption exists in case the instrument is attacked as a conveyance in fraud of creditors.

§ 321. Description of Land Conveyed; Boundaries.—The description of the land affected by the deed is usually by metes and bounds, all the land included within the boundaries so described passing to the grantee, together with buildings and other fixtures so annexed as to be part of the land, and all easement and other incorporeal rights appurtenant to the land.¹ The intent of the parties in construing

11. See § 91, N. Y. Real Prop. L., and statutes in the different states.

12. See § 252, *ante*.

13. *Smith v. Allen*, 5 Allen (Mass.) 458; *Wereans v. Peebles*, 31 Barb. (N. Y.) 380; *Rogers v. Hillhouse*, 3 Conn. 398.

1. See cases cited in notes follow-

ing under this section. The description need not be by metes and bounds. Any description by which the land intended to be conveyed may be definitely identified is sufficient, as the "Jones farm," or "a house and lot" or "mill" or "factory" on a specified street or at a stated place, belong-

the description controls in all cases. Where monuments are referred to in the deed, such as stakes, marked trees, piles of stone, the land of adjoining owners, and the like, courses and distances creating an irreconcilable discrepancy are presumed to be erroneous to that extent, and the boundaries as indicated by such monuments are accepted as the true limits of the land conveyed.² The possibilities of error in running courses and distances in surveying are considerable, and the physical marks so referred to indicate the true lines as intended by the parties, concerning which the possibilities of error are more remote. Therefore if the line is described as running a stated number of feet to a stake, tree, street or other monument, at a stated angle from another line about which there is no dispute, but it appears that the distance to the monument is greater or less than the distance stated, or the angle stated will make it impossible for the line to meet the monument referred to, the true lines will be determined by the monument, the discrepancy in the distance and angle as stated being presumptively erroneous.³

ing to the grantor, or "all of his real estate" in a certain town and the like. *Butrick v. Tilton*, 141 Mass. 93; *Johnson v. Rayner*, 6 Gray (Mass.) 107; *Snow v. Orleans*, 126 Mass. 453; *Dikeman v. Taylor*, 24 Conn. 219; *Bird v. Bird*, 40 Me. 398; *Trentman v. Neff*, 124 Ind. 503; *Austin v. Dolbee*, 101 Mich. 292; *Wilson v. Hunter*, 14 Wis. 683; *Coleman v. Manhattan Co.*, 94 N. Y. 229. See *Ogden v. Jennings*, 62 N. Y. 526.

2. 4 Kent Com. 446; *Emery v. Fowler*, 38 Me. 99; *Pernam v. Wead*, 6 Mass. 131; *Goyette v. Keenan*, 196 Mass. 416; *White v. Loring*, 93 U. S. 514, 524; *White v. Williams*, 48 N. Y. 344; *Hoban v. Cable*, 102 Mich. 206; *Cox v. Couch*, 8 Pa. St. 147; *Bauer v. Gottmanhansen*, 65 Ill. 499; *Allen v. Kersey*, 104 Ind. 1.

3. See cases in preceding note. Thus in *Pernam v. Wead*, 6 Mass. 131, one of the distances was 3 1-2 inches longer than the actual distance between the land of two adjoining owners, referred to in the deed as monuments, and about which there was no dispute, and another distance was 5 1-2 feet longer than the line between the monuments. The lines as fixed by the monuments were held to be the true boundaries as the parties intended them. In *Hoban v. Cable*, 102 Mich. 206, the courses and distances as given in the deed did not make an enclosure, the lines in dispute not meeting. But the third line was to extend to a public street, the fourth line to extend along this street to the place of beginning. The court held that the true course was by a straight line from the second rear

It must be remembered, however, that this is a mere rule of construction, not to be used at all except in case of a discrepancy or ambiguity, and having no application where the true intent of the parties is clear. Therefore where it appears that the mistake was made in stating the monument, the intent of the parties to convey the parcel as determined by the courses and distances as stated in the deed being clear and certain, the monument will be disregarded and the intent of the parties as expressed by the courses and distances will govern.⁴

It is also well settled that where the deed refers to monuments not at the time in existence, but placed in position and the actual lines run in accordance therewith by the parties after the delivery of the deed, the same rule applies and the lines so established are taken as the true lines, though not in accordance with the courses and distances as described in the deed.⁵ In any of these cases a mere esti-

corner to the street, thence along the street to the place of beginning, treating the statements as to direction and distances to be error, this construction expressing the true intent of the parties, conveying the parcel which they actually intended the deed to convey.

4. In *White v. Luning*, 93 U. S. 514, 524, the court after referring to the general rule that in case of uncertainty ascertained monuments will control, said: "But this rule is not inflexible. It yields whenever, taking all the particulars of the deed together, it would be absurd to apply it. For instance, if the rejection of a call for a monument would reconcile other parts of the description, and leave enough to identify and render certain the land which the sheriff intended to convey, it would certainly be absurd to retain the false call and thus defect the con-

veyance." See, also, *Murdock v. Chapman*, 9 Gray (Mass.) 156; *Green v. Horn*, 207 N. Y. 489; *Buffalo, R. Co. v. Stigeler*, 61 N. Y. 348; *Tuxedo Park Ass'n. v. Sterling Iron, etc. Co.*, 60 App. Div. (N. Y.) 349; *Security Land, etc. Co. v. Burns*, 193 U. S. 167; *Wilson v. Hildreth*, 118 Mass. 578.

5. *Lerned v. Morrill*, 2 N. H. 197 (one of the monuments named in the deed was a stake and stones not actually erected until 18 months later, both parties then running the lines with the aid of a surveyor and erecting the monument, each entering and improving his land to the line so formed); *Emery v. Fowler*, 38 Me. 99; *Makepeace v. Bancroft*, 12 Mass. 469. See *Knowles v. Toothaker*, 58 Me. 172, and cases cited.

Of course where stakes or other existing monuments are not referred to in the deed and are not brought

mate of the quantity of the land conveyed, in acres, square feet, or the like, will give way to monuments or to courses and distances, being obviously the least definite and reliable form of description.⁶

Where monuments, erected or to be erected, are not referred to in the deed, but the parties subsequently run out an established line and erect monuments, each long occupying and holding to the line so established, neither will be permitted to depart therefrom in case the description in the deed is ambiguous or uncertain.⁷ If the description be uncertain or ambiguous the line as actually adopted is taken to be the true line as intended by the parties. But where there is no ambiguity or uncertainty in the description, the line as run by the parties being erroneous, the mere running of the line by the parties is not conclusive upon them and the true line will determine their rights unless by entry and long continued possession by either an equity is created in his favor against the other estopping him from enforcing the true line as described in the deed or unless such possession has continued for over twenty years.⁸

to the attention of the grantee at the time of the conveyance, he is in no way affected by the monuments, having a right to rely on the description in the deed. If he buys with reference to such monuments he is bound by them, though the description varies therefrom. A subsequent purchaser for value without notice would not be so bound. See *McKinney v. Doane*, 155 Mo. 287.

6. *Emery v. Fowler*, 38 Me. 99; *Waterman v. Johnson*, 13 Pick. (Mass.) 261; *Lerned v. Morrill*, 2 N. H. 197; *Pelts v. Gaw*, 15 Pa. St. 218; *Allen v. Kersey*, 104 Ind. 1; *Thayer v. Fenton*, 108 N. Y. 394; *Andrews v. Rue*, 34 N. J. L. 402.

7. *Knowles v. Toothaker*, 58 Me. 172; *Reynolds v. Boston Rubber Co.*,

160 Mass. 240; *Baldwin v. Brown*, 16 N. Y. 359; *Reed v. Farr*, 35 N. Y. 113; *Taub v. Spector*, 124 App. Div. (N. Y.) 158; *Burr v. Smith*, 152 Ind. 469 (last three cases involving adverse possession for over 20 years); *Roberts v. Berks*, 223 Ill. 291 (no ascertained line—line thereafter established by parol held good); *Adams v. Betz*, 167 Ind. 161 (parol partition between heirs); *Breaker v. Woolsey*, 149 Mich. 86 (great uncertainty as to true line—actual line established and accepted for years held good); *Lewis v. Organ*, 149 Cal. 505 (where there is no uncertainty, a line so established by parol is not good); *Meeks v. Willard*, 57 N. J. L. 22.

8. Where the parties build fences or walls not on the true line by mis-

Where courses and distances as stated in the description are in conflict the one with the other, there is no presumption of one over the other. The true intent of the parties as shown by the entire instrument construed in the light of the accompanying circumstances will control.⁹

§ 322. **Boundaries on Streams, Lakes, etc.**—Ownership of land on a stream presumptively extends to the middle or thread of the stream. Therefore a grant of land described as bounded by a stream carries with it title to the middle line of the stream, subject to the right of the public to use the river for purposes of navigation if it be of such size and character as to be capable of such use.¹ The stream, in such case is a monument, like a wall or ditch, and the dividing line between the two adjoining parcels is through the center of the monument, one half of which is

take, no estoppel is raised and either may insist on the true line on discovering the mistake. *Iverson v. Swan*, 169 Mass. 582; *Hall v. Eaton*, 139 Mass. 217, 223. In such cases the building of the fence is not to settle a doubt as to the position of the true line.

See, also, *Burr v. Smith*, 152 Ind. 469; *Roberts v. Birks*, 223 Ill. 291; *Adams v. Betz*, 167 Ind. 161, and other cases in preceding note. As appears by several of these cases possession for upwards of twenty years makes such a line established by practical location good in any event by adverse possession.

9. *Hall v. Eaton*, 139 Mass. 217; *Loring v. Norton*, 8 Greenl. (Me.) 61. 68. See cases in note 4, *supra*, particularly *Green v. Horn*, 207 N. Y. 489, on the general principle that the true intent to be gathered from the entire instrument in the light of surrounding circumstances will govern,

irrespective of presumptive rules of construction.

1. *Starr v. Child*, 20 Wend. (N. Y.) 149; *Sleeper v. Laconia*, 60 N. H. 201; *Arnold v. Elmore*, 16 Wis. 509; *Watson v. Peters*, 26 Mich. 508; *Agawam Canal Co. v. Edwards*, 36 Conn. 476 (artificial stream); *Halsey v. McCormick*, 13 N. Y. 296; *Oakes v. De Lancey*, 133 N. Y. 227; *Smith v. Bartlett*, 180 N. Y. 360.

Land bounded by public waters extends to high water mark, as heretofore explained, title to the shore, or land between high and low water mark being in the state. Public waters include the sea, arms of the sea, and great rivers forming boundaries between states, other large streams, such as the Hudson River, the Great Lakes, and other large bodies of water title to the land beneath their waters being in the state. See § 311, *ante*.

presumed to be on each of the adjoining parcels in the absence of some statement in the description to the contrary.²

But where the description defines the line as running to the bank of the river and thence along the bank or margin or along the shore to a point situated on the bank, the bed of the stream does not pass to the grantee, the intent to convey only to the bank or margin of the stream being affirmatively expressed.³ Nevertheless, a description of a line as running to a monument on the bank, thence along the river or stream to another monument on the bank, does not show affirmatively an intent to convey only to the brink of the stream, and the bed to the middle line passes, the monuments being used simply to indicate the direction of the lines leading to the river, and the length of the boundary on the stream.⁴ An intent to limit the grant to the margin or bank ought to be clearly expressed to have that effect, as the intent of the average man in the usual case would not be to reserve in himself title to a strip of land under water of no value to him.⁵

2. *Starr v. Child*, 20 Wend. (N. Y.) 149; *Warner v. Southworth*, 6 Conn. 471, 474; *Smith v. Rochester*, 92 N. Y. 463; *Fulmer v. Williams*, 122 Pa. St. 191; *Schulte v. Warren*, 218 Ill. 108.

Where the grantor owns the land on both sides of the stream a conveyance or devise of the land on one side extends to the middle of the stream if a contrary intent is not expressed. *Smith v. Bartlett*, 180 N. Y. 360. But a conveyance by a grantor owning the entire stream but owning the land only on one side of it, conveys the entire stream, in the absence of some express provision to the contrary, it being reasonable to infer an intent to convey his entire title and interest. *Haberman v. Baker*, 128 N. Y. 253.

3. See cases in last two notes, also *Dunlap v. Stetson*, 4 Mason (U. S.) 349; *Storer v. Freeman*, 6 Mass. 435; *Hatch v. Dwight*, 17 Mass. 298; *Hall v. Whitehall Water Power Co.*, 103 N. Y. 129; *Kanouse v. Stockbower*, 48 N. J. Eq. 42; *Peoria v. Central N. Bk.* 224 Ill. 43.

4. *Luce v. Carley*, 24 Wend. (N. Y.) 451; *Starr v. Child*, 20 Wend. (N. Y.) 149 (dicta).

5. In *Sleeper v. Laconia*, 60 N. H. 201, the description ran, "thence northwesterly on the line of Baldwin's land to the river, thence northeasterly on the river shore to Church Street," the court held that the grant extended to the middle of the stream, the court holding that "thence on the river shore" is in effect equivalent to "on the river," just as the

In cases where the grant is limited expressly to a line along the bank, the grantee takes title to the water's edge at low water, and is not limited to the water's edge during times of high water in the spring and fall.⁶

Under the common law and by weight of authority under the later cases, the same rules apply to lakes and ponds, whether natural or artificial, named as boundaries, viz.: in the absence of some expression of intent to the contrary title passes to the center line or thread thereof.⁷ In the case of the Great Lakes, and large navigable lakes such as Lake George and Lake Champlain, this rule has no application, since these lakes are public waters, like great rivers and arms of the sea, title to land under their waters being in the state.⁸ In Massachusetts, by the provisions of a colonial law, continued as the law of that state, lakes or ponds of over ten acres are public property, title to the land under their waters being in the state. In that state it follows that such a conveyance carries title only to low water mark. This rule has been followed in other New England states.⁹

expression "by the side of the highway," is identical in meaning with "on the highway," citing *Woodman v. Spencer*, 54 N. H. 507; *Motley v. Sargent*, 119 Mass. 231; *Peck v. Deniston*, 121 Mass. 17; *O'Connel v. Bryant*, 121 Mass. 557.

In *Gouverneur v. Nat. Ice Co.*, 134 N. Y. 355, the court applied the same rule to a description bounding the land conveyed by a pond, monuments fixing the lateral lines at the water's edge not limiting the line along the pond to the edge thereof, title passing to the middle line of the pond.

6. *Halsey v. McCormick*, 13 N. Y. 296; *Murphy v. Copeland*, 58 Iowa 409; *Stevens v. King*, 76 Me. 197.

7. *Gouverneur et al. v. Nat. Ice Co.*, 134 N. Y. 355 (distinguishing *Wheeler v. Spinola*, 54 N. Y. 377); *Hardin v.*

Jordan, 140 U. S. 371 (holding this to be the rule in Illinois spite of *dicta* in *Trustees v. Schroll*, 120 Ill. 509, to contrary); *Ridgway v. Ludlow*, 58 Ind. 248. See cases cited and discussed in cases above cited.

8. See preceding note, also *Sloan v. Biemiller*, 34 Ch. St. 492.

9. *Waterman v. Johnson*, 13 Pick. (Mass.) 261; *Hittinger v. Eames*, 121 Mass. 539; *Bradley v. Rice*, 13 Me. 198; *Mill River, etc. Co. v. Smith*, 34 Conn. 462 (*dicta*); *Holden v. Chandler*, 61 Vt. 291.

Where a pond is formed by damming a stream, a grantee of land bounded by the mill pond formed in this way takes to the center of the stream thus enlarged. *Lowell v. Robinson*, 16 Me. 357; *Mill River, etc. Co. v. Smith*, 34 Conn. 462.

In some other states these cases have been followed, the distinction being made that title passes to the middle line or thread of artificial lakes, particularly those made by damming streams, but only to the margin if the lake is a natural one, though the reason for the rule as it exists in Massachusetts does not exist in these other states.¹⁰

§ 323. Boundaries on Streets and Highways.—As in the case of streams, owners of land on either side of a highway own presumptively to the middle line thereof. In all cases of deeds in which a highway is named as a boundary the instrument transfers title to the middle line of the way, in the absence of an express provision in the instrument limiting the land conveyed to the edge or margin thereof. The principle underlying the cases is that the actual intent of the parties shall govern. No difficulty exists in cases describing the property line as extending “along” or “on” the street or highway. The land conveyed extends to the middle of the way as it would extend to the middle of a wall, rock, or ditch, or other similar monument having width.¹ So there is no difficulty where the description by express words excludes the way from the land conveyed.²

Where a natural pond is enlarged by a dam, but the riparian owners have been accustomed to lower the level of the pond by means of sluices, the grantee takes to the low water line thus formed. *Paine v. Woods*, 108 Mass. 160. In each of these cases the controlling consideration is the intent of the parties as reasonable men in the light of the special circumstances of each case.

10. *Kanouse v. Stockbower*, 48 N. J. Eq. 42; *Boorman v. Sunnucks*, 42 Wis. 233; *Trustees v. Schroll*, 120 Ill. 509, held not to be law in *Hardin v. Jordan*, 140 U. S. 371.

1. *Berridge v. Ward*, 10 C. B. N.

S. 400; *Bissell v. N. Y. Central R. Co.*, 23 N. Y. 61; *Van Winkle v. Van Winkle*, 184 N. Y. 193; *Humphreys v. Eastlack*, 63 N. J. Eq. 136 (ownership of grantor to center of street should be shown); *Motley v. Sargent*, 119 Mass. 231; *Gould v. Wagner*, 196 Mass. 270 (rule applies to private as well as public ways); *Neely v. Philadelphia*, 212 Pa. St. 551; *Kneeland v. Van Valkenburgh*, 46 Wis. 434 (lot conveyed as appearing on map. Title to center line of street passes); *Wegge v. Madler*, 129 Wis. 412.

2. *Hamlin v. Atty.-Gen.*, 195 Mass. 309; *McKenzie v. Gleason*, 184 Mass.

But where the description defines the line as extending along the "side" of the road, or beginning at a monument on the side or margin and extending "along" the road or "along the side" thereof, to another point or monument also on the side or margin, without language expressly excluding the nearer half of the road, considerable difficulty has been experienced by the courts in establishing a controlling rule. A literal construction of the deed in these cases necessarily limits the land conveyed to the margin of the way, and perhaps the majority of the cases take this view.³ On the other hand owners of property give little actual attention to the usually empty ownership of land occupied by a highway. Monuments showing the intersection of side lines with the highway must necessarily be placed on the edge of the way rather than on the middle line, and it is therefore natural that owners should describe their property as extending along the edge of the way, or along the way from one such monument to another, though there is no thought of retaining ownership in the land on which the highway is. Such ownership naturally goes with the

452 (if the description does not expressly limit the grant to the side of the road or street it will include the road to the center line); *Trowbridge v. Ehrich*, 191 N. Y. 361 (description starting at a point on the northerly line of the street, etc.); *Blackman v. Riley*, 138 N. Y. 318; *Tietjen v. Palmer*, 121 App. Div. (N. Y.) 233.

3. *Sibley v. Holden*, 10 Pick. (Mass.) 249 ("beginning at a stake and stones on the southerly side of a town road," thence by various courses "to said road; thence by said road easterly to the place of beginning," was held to convey to the edge of the road only); *Buck v. Squires*, 22 Vt. 484; *McKenzie v. Gleason*, 184 Mass. 452; *Winter v.*

Peterson, 24 N. J. L. 524, 527; *Owen v. Brookport*, 208 Ill. 35.

Where the starting point is expressly made on the outer line of the street, as at the intersection of the northerly line of said street with the easterly line of an intersecting street, the land within the street is held to be expressly excluded. *Trowbridge v. Ehrich*, 191 N. Y. 361. But when the boundary runs to a mark upon a fence or tree upon the side of a highway, and thence along the highway, the stake or mark merely indicates the position of the side line, not the end thereof, and title passes to the center of the highway. *Van Winkle v. Van Winkle*, 184 N. Y. 193.

adjoining land, and is of value to the grantor if retained by him only for the purpose of improperly harassing his grantee at some later time. Public policy clearly favors the rule established by several of the best considered decisions that even in these cases title to the middle of the highway passes unless the intent of the parties as reasonable men that title to the margin only was to pass is affirmatively shown either by a statement in the deed to that effect, or by facts and attendant circumstances clearly establishing what the actual intent of the parties was at the time of the conveyance.⁴

Where the grantor's title extends only to the margin of the road, as in the case of lands on public streets in New York City and other cities in which places title to the streets in fee is in the city, the street as a monument in the description is construed as giving title only to its margin.⁵ This applies to conveyances of land on such streets by the city as well as to conveyances by private owners.⁶

Where a line is described as beginning at a street and running ten rods, or any other fixed distance, therefrom, the

4. *Paul v. Carver*, 26 Pa. St. 223 (description ran to a certain street, "thence southeasterly along the northerly side of said street." Held title to middle of the street passed, the attendant circumstances showing that this was the intent); *Salter v. Jonas*, 39 N. J. L. 469 (after stating that the intent to reserve this strip occupied by the highway is very seldom present, the court said: "This being undeniably the practice and general understanding, to give a close and literal meaning to the descriptive terms employed in such instances would serve no useful purpose * * * The particular words should, in such transactions, be controlled and limited by the manifest intention which is unmistakably displayed in

the nature of the affair and the situation of the parties."); *Cox v. Freedley*, 33 Pa. St. 124; *Champlin v. Pendleton*, 13 Conn. 23. See, also, similar cases of land bounded by streams, § 322, note (4), *ante*. The rule should be the same in the case of both highways and streams. See, also, *Kneeland v. Van Valkenburgh*, 46 Wis. 434, and *Wegge v. Madler*, 120 Wis. 412.

5. *Dunham v. Williams*, 37 N. Y. 251 (ownership of land in the street being in another, the deed conveyed only to the margin, not to center of street); *Graham v. Stern*, 168 N. Y. 517; *Foley v. McCarthy*, 157 Mass. 474; *Chicago v. Rumsey*, 87 Ill. 348.

6. *Graham v. Stern*, 168 N. Y. 517; 51 App. Div. 406.

distance is taken to be from the side of the street rather than from the middle, measurements being regularly made in that way, though title passes to the middle line.⁷

If the entire roadbed belongs to the grantor, together with land on one side of the road only, a conveyance of that land, described as bounded by the road, will carry with it the entire roadbed, it being clear that the grantor did not intend to reserve to himself title to any part of the roadbed, he having no title to land on the opposite side of the road.⁸

The rules applying to public streets and highways in this connection apply to private ways, so that title to the middle of the way passes to the purchaser of land abutting thereon in the absence of an express provision in the deed to the contrary. This question arises most frequently where a subdivision into lots or plots has been made, proposed streets having been laid out and mapped, and the lots sold with reference thereto. Each purchaser of a lot gets title to the middle of the proposed street unless the contrary intent is expressed in the deed.⁹

7. *Dodd v. Witt*, 139 Mass. 63 (holding, however, that evidence tending to establish that the parties fixed monuments at points within the side-line of the street in measuring the side lines of the lot conveyed should be received as showing in what sense the language of the description was used); *Fraser v. Ott*, 95 Cal. 661.

8. *Haberman v. Baker*, 128 N. Y. 253. See *Johnson v. Grenall*, 188 N. Y. 407.

9. *Bissell v. N. Y. Cent. R. Co.*, 23 N. Y. 61; *White v. Godfrey*, 97 Mass. 472; *Gould v. Wagner*, 196 Mass. 270; *Pitney v. Husted*, 8 App. Div. (N. Y.) 105. In *Mott v. Mott*, 68 N. Y. 246, a conveyance of land

bounded by a private lane was held not to convey title to the middle line of the lane, it appearing that the lane was of little value to the land granted and of considerable value to the land retained by the grantor, and a right of way having been granted to the grantee over the way, negating an intent to give him the fee.

In a few cases it has been held without good reason, that this rule does not apply to private ways, based on the grantor's presumed intent to thereafter control the land included in the way. *Bangor House Proprietary v. Brown*, 33 Me. 309; *Ames v. Hilton*, 70 Me. 36; *Seymour v. Page*, 33 Conn. 61.

§ 324. **Covenants for Title in Deeds.**—A warranty deed with full covenants contains the covenants, (a) of seisin, (b) of right to convey, (c) against encumbrances, (d) for further assurance, (e) of quiet enjoyment and (f) of warranty.

The covenant of seisin is an undertaking on the part of the grantor that he is seised as owner of the land which the deed purports to convey, and of every part thereof, including all buildings, fences and other fixtures attached thereto. It is broken if he has no title to the property, or no title to some part thereof, or if he has only a life estate or an estate in remainder when the deed purports to transfer a fee.¹ It is also broken if a fence, building or other fixture on the land which is ostensibly a part of it, belongs to another, so that the fixture does not pass under the deed.²

The covenant of right to convey is for most purposes equivalent to the covenant of seisin. It is broken when the

1. *Greenby v. Wilcocks*, 2 Johns. (N. Y.) 1; *Hunt v. Raflee*, 44 Hun (N. Y.) 149; *Comstock v. Comstock*, 23 Conn. 349; *Mills v. Catlin*, 22 Vt. 106; *Allen v. Allen*, 48 Minn. 462; *Claff v. Herdman*, 25 Ill. App. 509.

The covenant of seisin is broken when a tenant in common purports to convey the entire estate. *Sedgwick v. Hollenback*, 7 Johns. (N. Y.) 376. It is not broken by the existence of a tenancy for years, the grantor being seised through the possession of the tenant. *Kellum v. Berkshire Life Ins. Co.*, 101 Ind. 455.

2. *Mott v. Palmer*, 1 N. Y. 564; *Herzog v. Marx*, 202 N. Y. 1; *Van Wagoner v. Van Vostrand*, 19 Iowa 427.

In Massachusetts and one or two other states the covenant of seisin is not broken if the grantor is ac-

tually seised, though seised as a wrongdoer in adverse possession, seisin being taken in its technical common law sense. *Marston v. Hobbs*, 2 Mass. 433; *Bearce v. Jackson*, 4 Mass. 408; *Stambaugh v. Smith*, 23 Oh. St. 584; *Fairbrother v. Griffin*, 10 Me. 91. In most states the grantor is liable in such case, he not having been seised of his own right. See cases first cited above.

The covenant is not broken by the existence of a lien, easement or right of dower in another, since such incumbrances do not interfere with the grantor's seisin as owner. In such cases the covenants against encumbrances and of warranty are broken. *Sedgwick v. Hollenback*, 7 Johns. (N. Y.) 376; *Douglas v. Thomas*, 103 Ind. 187; *Tinte v. Miller*, 10 Ohio 382.

covenant of seisin is broken, and the measure of damages in each case is the same, since a person ordinarily has no right to convey that of which he is not seised as owner.³ The cases to which this covenant most frequently applies where the covenant of seisin would not be broken are cases of conveyances by trustees who have no right to convey, though seised of the property.^{3a}

The covenant against encumbrances, as the term indicates, is an undertaking on the part of the grantor that no mortgage, judgment, tax or other liens exist against the property, except as may be stated in the deed, and that there are no outstanding rights, such as inchoate dower, easements or leases which affect the value of the property.⁴ In these cases there is no breach of the covenant of seisin or of right to convey, since the grantor was seised of the estate in the land which the deed purported to transfer. These three covenants are said to be broken as soon as made, and are therefore personal choses in action as between the grantor and the grantee which cannot run with the land in favor of subsequent purchasers.⁵ The modification of this doctrine by the modern cases is discussed in the section following.

Though an exception of an easement or other encum-

3. *Peters v. Bowman*, 98 U. S. 56; *Mitchel v. Hazen*, 4 Conn. 513; *Byles v. Lawrence*, 35 Mich. 458.

3a. *Rawle Covenants*, § 66.

4. Broken by outstanding easements, *Kramer v. Carter*, 136 Mass. 504; *McMullen v. Wooley*, 2 Lans. (N. Y.) 294; *Huyck v. Andrews*, 113 N. Y. 81; *Morgan v. Smith*, 11 Ill. 199; *Medler v. Hyatt*, 8 Ind. 171; *Cathcart v. Bowman*, 5 Pa. St. 317; *Mitchell v. Warner*, 5 Conn. 497. Outstanding rights of dower—*Bigelow v. Hubbard*, 97 Mass. 195; *Carter v. Denman's Exrs.*, 23 N. J. L. 260.

Restrictive covenants or others running with the land—*Locke v. Hale*, 165 Mass. 20; *Bronson v. Coffin*, 108 Mass. 175; *Doctor v. Darling*, 68 Hun (N. Y. 70; liens and other encumbrances—*Tibbetts v. Leeson*, 148 Mass. 10; *Lafferty v. Mulligan*, 165 Pa. St. 534; *Kelsey v. Romer*, 43 Conn. 129. A general covenant against nuisances is not an encumbrance, imposing no greater burden than the law requires. *Floyd v. Clark*, 7 Abb. N. C. (N. Y.) 136.

5. See cases above cited, also section following.

brance cannot be proved by parol because of the parol evidence rule,⁶ yet the purchaser's knowledge of the existence of a lease or of a highway, technically amounting to encumbrances but really adding to the value of the property, may be shown for the purpose of establishing that they were not intended to be included within the terms of the covenant.⁷

The covenant for further assurance is merely a promise to execute or procure any further deed, release, satisfaction piece or other instrument which may be found necessary later to perfect the title of the grantee, and which it is reasonably possible to obtain.⁸

6. *Flynn v. Boweneaf*, 143 Mass. 277; *Long v. Moler*, 5 Oh. St. 271; *Edwards v. Clark*, 83 Mich. 246; *contra*, *Pitman v. Conner*, 27 Ind. 337; *Sidders v. Riley*, 22 Ill. 109.

Knowledge of the incumbrance is not a defence, and parol evidence will ordinarily be excluded when offered to prove knowledge. *Huyck v. Andrews*, 113 N. Y. 81; *Beach v. Miller*, 51 Ill. 206; *Yancey v. Tatlock*, 93 Iowa 386.

7. Highways. *Whitbeck v. Cook*, 15 Johns. (N. Y.) 483 (involving covenant of seisin, the court stating that a highway adding to the value of the land and if known to the parties is not an encumbrance, to hold otherwise being contrary to reason and the general understanding, approved in *Huyck v. Andrews*, 113 N. Y. 81); *Jordan v. Eve*, 31 Grat. (Va.) 1; *Patterson v. Arthurs*, 9 Watts. (Pa.) 152; *Patten v. Fitz*, 138 Mass. 456; *Holmes v. Danforth*, 83 Me. 139. That a highway is an encumbrance. See *Sprague v. Baker*, 17 Mass. 586; *Burk v. Hill*, 48 Ind. 52; *Beach v. Miller*, 51 Ill. 206; *Hubbard v. Norton*, 10 Conn. 431.

Tenancy for years. *Rawle Covenants*, § 77; *Pease v. Christ*, 31 N.

Y. 141; *Kellum v. Berkshire Life Ins. Co.*, 101 Ind. 455; *contra*, *Edwards v. Clark*, 83 Mich. 246. That a tenancy for years is usually an encumbrance where knowledge of the purchaser is not shown, see *Batchelder v. Sturgis*, 3 Cush. (Mass.) 201; *Demars v. Koehler*, 60 N. J. L. 314; *Edwards v. Clark*, 83 Mich. 246.

A party wall easement, being to the advantage of both parcels, is not an incumbrance. *Hendricks v. Stark*, 37 N. Y. 106; *Everett v. Edwards*, 149 Mass. 588 (dicta); *Bertram v. Curtis*, 31 Iowa 46. See § 293 note 1, *ante*. See *contra*, *Markey v. Hermon*, 34 Minn. 168; *Burr v. Lamaster*, 30 Neb. 688.

A perpetual party wall easement giving the right to erect a party wall whenever any building may be erected to rebuild it after destruction of the building, etc., is an encumbrance. *O'Neal v. Van Tassel*, 137 N. Y. 297, § 293, note 1, *ante*. So where the wall stands entirely on the premises sold, the right of the adjoining owner to use it as a common wall is an encumbrance. *Mohr v. Parmelee*, 43 Super. Ct. 320.

8. This covenant has not been enforced in many cases in the United

The covenant for quiet enjoyment is broken by an eviction of the grantee committed by the grantor or by any person claiming under him, or by one having a paramount title.⁹ Mere acts of trespass not amounting to an eviction do not constitute a breach,¹⁰ nor does this covenant extend to acts of strangers, however wrongful.¹¹ The eviction constituting a breach may be by actual physical ouster of the grantee or any of his successors in interest by the grantor,¹² or by his being required to surrender the premises to a paramount owner either as the result of an action to recover the property or without such action on demand.¹³ When

States. It is enforced generally by specific performance rather than by an action at law for damages. Rawle, Covenants, §§ 98-109. See *King v. Jones*, 5 Taunt. 418; *Cockran v. Pascault*, 54 Md. 1; *Kramer v. Rieke*, 70 Iowa 535; *Colby v. Osgood*, 29 Barb. (N. Y.) 339.

9. See cases in notes following.

10. There must be an ouster of the grantee from the property conveyed or some part thereof accomplished by the grantor's wrongful act or by failure of his title. *Bartlett v. Farrington*, 120 Mass. 284; *Avery v. Dougherty*, 102 Ind. 443. See § 160, *ante*, as to breach of this covenant between landlord and tenant.

11. *Greenby v. Wilcocks*, 2 Johns. (N. Y.) 1; *Gardner v. Keteltas*, 3 Hill (N. Y.) 330; *Andrews v. St. L. Smelting, etc. Co.*, 130 U. S. 643; *Bartlett v. Farrington*, 120 Mass. 284; *Moore v. Weber*, 71 Pa. St. 129; *Gazzolo v. Chambers*, 73 Ill. 75.

A covenant warranting against the acts of "any person or persons whatever" was construed as not expressly including wrongful ousting by a stranger in *Branger v. Manciet*, 30 Cal. 624.

12. Rawle Covenants, § 128; *Sedgwick v. Hollenback*, 7 Johns. (N. Y.) 376; *Akerly v. Vilas*, 23 Wis. 207. See § 160, *ante*.

13. *Kent v. Welch*, 7 Johns. (N. Y.) 258; *Boreel v. Lawton*, 90 N. Y. 293; *McGrew v. Harmon*, 164 Pa. St. 122; *Mitchell v. Warner*, 5 Conn. 479; *Carter v. Denman*, 23 N. J. L. 260; *Barry v. Guild*, 126 Ill. 439; *Merritt v. Morse*, 108 Mass. 275. See 8 Am. and Eng. Cyc. Law, pp. 98, 99, for other cases.

The grantee may surrender possession on demand without submitting to ouster by ejectment, provided the outstanding title is good; the ouster is then complete. *Fowler v. Poling*, 6 Barb. (N. Y.) 165; *Home Life Ins. Co. v. Sherman*, 46 N. Y. 370; *Burrage v. Smith*, 16 Pick. (Mass.) 56; *Knepper v. Kurtz*, 58 Pa. St. 480; *Beebe v. Swartwout*, 8 Ill. 162; *Mason v. Kellogg*, 38 Mich. 132.

If he purchases the outstanding title or takes a lease from the true owner the ouster is complete and he may sue for breach of this covenant. *Tucker v. Cooney*, 34 Hun (N. Y.) 227; *Cowdrey v. Coit*, 44 N. Y. 382;

the true owner is in possession at the time the deed is delivered the covenant of quiet enjoyment is broken from the beginning. The grantee may sue for its breach at once without bringing a useless action against the true owner.¹⁴ It is not broken, however, if the grantee is kept out by a stranger holding without right.

The covenant of warranty, by which the grantor warrants his title to the state conveyed by the deed binds the grantor to make good any loss resulting to the grantee or his successors in interest from ouster by paramount title, and to defend the title against hostile claimants. As in the case of the covenant for quiet enjoyment it can be broken only by an eviction. No action will lie because of mere failure of title. Until the paramount owner has asserted his right and recovered possession of the property this covenant is not broken.¹⁵

The covenant of warranty and of quiet enjoyment are both broken by an eviction resulting from the enforcement of a mortgage or other lien,¹⁶ or by admeasurement of dower,¹⁷ or by the exercise and enforcement of an easement, re-

Kellog v. Platt, 33 N. J. L. 328; Sprague v. Baker, 17 Mass. 586; Harding v. Larkin, 41 Ill. 413; McGary v. Hastings, 39 Cal. 360.

In these cases the outstanding title must be asserted in a hostile way, the owner demanding his property, and the vendee or tenant acts at his peril in recognizing the adverse title. See cases above cited.

14. Shattuck v. Lamb, 65 N. Y. 499; Jones v. Warner, 81 Ill. 343; Fritz v. Pusey, 31 Minn. 368.

If the grantor retains possession himself he may be sued for breach of the covenant of quiet enjoyment. Jones v. Timmons, 21 Oh. St. 596.

15. Beldoe v. Wadsworth, 21 Wend. (N. Y.) 120; Jenkins v. Hopkins, 8

Pick. (Mass.) 346; Barry v. Guild, 126 Ill. 439. See cases cited in note 13 *supra*, the covenant of warranty being broken in every case in which the covenant of quiet enjoyment is broken by enforcement of a paramount title. The two covenants cover substantially the same ground, except that the covenant of warranty is not broken by an eviction through the wrongful acts of the grantor.

16. Hill v. Beacon, 110 Mass. 387; Cornish v. Capron, 136 N. Y. 232; King v. Killride, 58 Conn. 109; Rinehart v. Rinehart, 91 Ind. 89.

17. Bostwick v. Williams, 36 Ill. 65; Blanchard v. Blanchard, 48 Me. 174.

strictive agreement or other hostile paramount right by which the grantee is ousted from the enjoyment of any part of the land conveyed.¹⁸ The covenant against encumbrances is broken in these cases by the mere existence of such encumbrances. The covenants of warranty and quiet enjoyment are broken only when an ouster from some part of the property results from their exercise or enforcement.

The last three covenants discussed, viz.: for further assurance, quiet enjoyment and warranty, are not broken as soon as made, as in the case of the first three covenants referred to above, but remain executory until a subsequent breach. They are not mere personal choses in action, and therefore under the old law as well as by the modern cases they run with the land, being enforceable by any successor in interest of the grantee who may be owner of the property in question at the time the covenant is broken. The covenant of further assurances is broken by failure or refusal to give or procure any further instrument required to perfect the title transferred, and must always take place some time after the conveyance. So eviction, following necessarily after the conveyance to the grantee and entry by him, constitutes the breach of the covenants of quiet enjoyment and warranty. The question of the running of all covenants for title with the land is discussed in the following section.

§ 325. How Covenants for Title Run With the Land.—

We have seen that covenants in deeds or leases affecting the estate conveyed run with the land because they define the tenure existing between the tenant and the reversioner or remainderman, or the relation existing between the owners of the dominant and servient estates when made as express

18. *Kramer v. Carter*, 136 Mass. 504; *Scriver v. Smith*, 100 N. Y. 471.

If the grantee is deprived of an easement appurtenant to the estate conveyed to him by failure of his

grantor's title, the covenant of warranty is broken. *Adams v. Conover*, 87 N. Y. 422; *Green v. Collins*, 86 N. Y. 246; *Peters v. Grubb*, 21 Pa. St. 455 See *contra*, *Mitchell v. Warren*, 5 Conn. 497.

terms or limitations of easements and profits. They run with the land because they are controlling terms or limitations of the estate or interest in the land held by the parties involved.¹ Covenants for title present a more difficult problem. As between landlord and tenant the covenant of quiet enjoyment and of power to demise, or title, whether express or implied, run with the land like other covenants affecting the tenure, but as between the vendor and vendee of an estate in fee, between whom no tenure has existed since the enactment of the statute *Quia Emptores*, another principle must be found to explain the running of these covenants for title with the land.

The covenants of quiet enjoyment, of warranty and of further assurance unquestionably run with the land so as to be enforceable by any successor in interest of the grantee who may be owner when the breach takes place.² These succeeding owners are not parties to the contract, are strangers to the consideration, and therefore cannot enforce these covenants by virtue of the ordinary principles of contracts, unless the covenant may be regarded as assigned with the land whenever it is conveyed or devised. But they have not usually been enforced as assigned personal contracts in these cases, and therefore this principle must be abandoned as the explanation of the rule. They run with the land so as to be enforceable by subsequent owners against the covenantor because the parties intended that the grantor's warranty should attach to the title as an incident thereof, passing with it to all subsequent takers, strengthening and supporting it in their hands. The other class of covenants running with the land as defining the tenure or other relationship of the parties with respect to the land are enforce-

1. See Ch. XVIII, *ante*.
 2. Rawle, Covenants, § 213, et seq.;
Mygatt v. Coe, 147 N. Y. 456; *Geis-*
ler v. De Graaf, 166 N. Y. 339, 342;
Peters v. Bowman, 98 U. S. 59;
Carter v. Denman, 23 N. J. L. 260;

Butler v. Barnes, 60 Conn. 170;
Wead v. Larkin, 54 Ill. 489; *Wy-*
man v. Ballard, 12 Mass. 306; *Fisher*
v. Parry, 68 Ind. 469. See, also, 8
Am. & Eng. Ency. Law, pp. 142, 143,
 156, and cases there cited.

able by subsequent purchasers, strangers to the contract, because the parties so intended. Covenants for title run with the land for the same reason. The parties intended that they should attach to the title and pass with it to be enforced by subsequent holders in exactly the same way. If covenants can be attached to an estate for life or for years or to an easement as qualifying or enhancing it there is no good reason why covenants of title cannot be attached to the title where the fee is conveyed if the parties so desire. In the first class of cases the covenant is incident to the estate created; in the cases under discussion the covenants are incident to the title.

The first three covenants referred to in the preceding section, viz.: of seisin, power to convey and against encumbrances, are intrinsically of the same nature and are intended to assure and strengthen the grantor's title in exactly the same way. But it seems to be settled under the older cases that these covenants did not run with the land because they were necessarily broken as soon as made, and were from the beginning mere accrued choses in action giving to the grantee an immediate action for damages, which was purely personal in the grantee and which for that reason could not run with the land.³ This reasoning and ruling are both purely technical. It is well settled that the grantee cannot collect substantial damages until he has been ousted, or until the encumbrance has been enforced against him, as the case may be. Therefore, substantially and practically, his recovery can be had only after he has incurred the actual damage which these covenants are designed to protect him against. The actual intent of the parties must have been the same in these covenants as in the covenants for further assurance, of quiet enjoyment and warranty, which are held to run with the land, viz.: that the person actually

3. *Greenby v. Wilcocks*, 2 Johns. Conn. 497; *Carter v. Denman*, 23 N. (N. Y.) 1; *Kramer v. Carter*, 136 J. L. 260. See 8 Eng. & Am. Ency. Mass. 504; *Mitchell v. Warner*, 5 Law, 152.

the holder of the title when the damage was incurred should have the right to maintain the action. In England and under statutes and later discussions in many of the states it is now settled that these covenants run with the land, rejecting the distinction established by the earlier cases.⁵

§ 326. Execution of Deeds; Signing and Sealing— Before the Statute of Frauds deeds conveying freehold estates in land had to be sealed by the grantor, but they did not have to be signed by him. The Statute of Frauds required that all conveyances of freehold estates in land and leases for over three years be in writing and signed by the parties creating or transferring the estates so created. Blackstone states that the statute added the requirement of signing to that of sealing,¹ but the English cases hold that a deed of conveyance under seal need not be signed, as the statute was not intended to apply to deeds under seal but only to such writings under the statute as did not require a seal, it being clear that sealed instruments are already sufficiently authenticated, nor do they present the danger arising from parol testimony which the statute sought to avoid.²

In the United States it is uniformly held under the statutes in the various states that deeds and conveyances must be signed or subscribed, whether under seal or not.³ In

5. Stat. 44 and 45 Vict. ch. 41, § 7; *Kingdon v. Nottle*, 1 M. & C. 355; *King v. Jones*, 5 Taunt. 418; *Geiszler v. De Graaf*, 166 N. Y. 339; *Mandigo v. Conway*, 90 N. Y. Supp. 324; *Richard v. Bent*, 59 Ill. 38; *Sinker v. Floyd*, 104 Ind. 292; *Sage v. Jones*, 47 Ind. 122; *Mecklin v. Blake*, 22 Wis. 495; *Security Bank v. Holmes*, 65 Min. 531; *Betz v. Bryan*, 36 Oh. St. 320; *Cole v. Kimball*, 52 Vt. 639; *Ballard v. Child*, 34 Me. 355. See statutes modifying the old rule and permitting the subsequent owner actually damaged to sue for breach of these covenants enacted in Maine,

Massachusetts, Georgia, Colorado and North Dakota.

In some of the cases above cited this result was reached by regarding the conveyance as an assignment of the right of action arising out of the technical breach which took place when the original deed containing the covenant was delivered.

1. 2 Bl. Com. 306.

2. *Cherry v. Heming*, 4 Ex. 631, 636, 3 Gray Cases Prop. 554.

3. *Goodman v. Randall*, 44 Conn. 321; *Mut. Ben. Ins. Co. v. Brown*, 30 N. J. Eq. 193; *Taylor v. Glaser*, 2 Serg. & R. (Pa.) 502.

some states they must be *subscribed*, in which case the signature must be at the end of the deed.⁴ Where the requirement of the statute is that they be signed merely, the signature may be in any part of the instrument.⁵ Signing by making a mark is sufficient, it being established that the mark was intended as the signature of the grantor, and it being clearly identified as his.⁶

The signing of the grantor's name to the deed by another in the presence of the grantor with his knowledge and assent is in all respects equivalent to a signature by himself. No question of agency is involved in such case, so that the person affixing the signature need not be authorized under seal. It is the direct personal act of the grantor.⁷

Seals were essential to the validity of all conveyances by deed of freehold estates or interests at common law. A bargain and sale under the Statute of Uses was good by parol, and therefore required no seal, until the Statute of Enrollments was passed to remedy this situation, requiring that they be in writing, under seal, and duly enrolled. This statute is not recognized as being in force in the United States. We have seen that in most if not all the states simple deeds of grant are provided for by statute, and that deeds of bargain and sale and lease and release are given the force and effect of the modern statutory deed.⁸ As these deeds do not take effect under the common law, but operate solely by virtue of the statutes providing for them, it follows that a seal is no longer essential to their validity except where the statute expressly so provides.⁹ In some

4. N. Y. Real Prop. L. § 242. See statutes in the different states.

5. *McConnell v. Brillhart*, 17 Ill. 354; *Smith v. Howell*, 11 N. J. Eq. 349 (dedication of trust); *Winston v. Hodges*, 102 Ala. 304.

6. *Ive v. Richardson*, 76 Ala. 329; *Truman v. Lore's Trustees*, 14 Oh. St. 144; *Devereaux v. McMahon*, 108 N. C. 134.

7. *Lovejoy v. Richardson*, 68 Me. 386; *Nye v. Lowry*, 82 Ind. 316; *Gardner v. Gardner*, 59 Mass. 483; *Mut. Ben. Life Ins. Co. v. Brown*, 30 N. J. Eq. 193; *Jansen v. McCahill*, 22 Cal. 563.

8. See § 317, *ante*.

9. In New York a seal was expressly required by 1 Rev. St., 738, § 137. This provision was repealed by

states seals are still required by statute,¹⁰ but in most states they are no longer essential to conveyances of land, either by the modern statutory deed or by deed under the Statute of Uses, the Statute of Enrollments not being in force in this country.¹¹

Where a seal is required an unsealed deed passes the equitable title, giving to the grantee the right to compel the

§ 208, Real Prop. Law of 1896, now § 242, Real Prop. Law, Consolidated Laws. This statute omits altogether the provision requiring a seal, the purpose of the revisers being to dispense with the seal as a requisite of a deed. See Appendix II, Fowler's Real Prop. L. (3rd ed.), under § 208. That a seal is no longer required in conveyances in New York, see *Leask v. Horton*, 39 Misc. 149; *Fitzgerald v. Graham*, 122 Fed. Rep. 401. In the absence of a decision by the Court of Appeals this question cannot be regarded as settled in New York, and to avoid all uncertainty a seal should be affixed.

In many states seals have been dispensed with as requisites of conveyances by express statutory provision. See 1 Stim. Am. St. L., § 1564 B; *Jerome v. Ortman*, 66 Mich. 668; *Harris v. Scouce*, 66 Mo. App. 345; *Pierson v. Armstrong*, 1 Ia. 282; *Switzer v. Knapps*, 10 Ia. 72; *Tatum v. Tatum*, 81 Ala. 388.

10. 1 Stim. Am. St. L. § 1564 A.

11. See note 9, *supra*. In several states where there is no statutory provision either expressly requiring or dispensing with seals in conveyances of land it is still held that seals are necessary, the reason being that conveyances are necessarily "deeds" in the technical common law sense,

therefore requiring seals. But the modern deed provided for by statute has taken the place of deeds under the Statute of Uses, which as we have seen, had taken the place of conveyances in the ancient common law form. Deeds under the Statute of Uses do not require seals in this country, as explained above. Therefore, where the modern statute does not expressly require a seal, it is clear that a seal is unnecessary to the validity of a modern deed, though a seal should be used if the deed contains covenants of title to avoid any uncertainty as to the effectiveness of such covenants and the application of the Statute of Limitations thereto. That seals are still required, see *Arnold v. Stevens*, 24 Pick. (Mass.) 109; *Huff v. McCauley*, 53 Pa. St. 206; *McLaughlin v. Randall*, 66 Me. 226; *Kingley v. Halbrook*, 45 N. H. 313; See *Suffern v. Butler*, 19 N. J. Eq. 202, at p. 209; *Cowdrey v. Cowdrey*, 64 Atl. 98 (N. J.). But see 2 N. J. Compiled Stat., 20, 20a, 20b, 20c, making deeds effective and valid though not sealed provided the attestation clause or acknowledgment or proof shall recite that the same was signed and sealed by the makers thereof. See statutes under "Deeds" or "Conveyances" in the different states.

grantor to execute and deliver to him a valid deed under seal.¹²

§ 327. Delivery of Deeds.— Before a deed becomes operative as a conveyance it must be delivered. Delivery takes place when the grantor, by some affirmative act or statement, declares his intent that the deed shall at once take effect as a conveyance of title to the land. It need not be delivered corporeally to the grantee or his agent. It is delivered and at once becomes operative if the grantor has by word or act clearly declared his intent to that effect, though the instrument remain in his possession.¹ Delivery to a third person without authority to accept in behalf of the grantee is good and the deed takes effect at once if the

12. *Nat. Prov. Bk. v. Jackson*, 33 Ch. Div. 1; *Wadsworth v. Wendell*, 5 Johns. Ch. (N. Y.) 224; *Jewell v. Harding*, 72 Me. 124; *Owen v. Frink*, 24 Cal. 171; *Cowdrey v. Cowdrey*, 64 Atl. 98 (N. J.).

1. *Ten Eyck v. Whitbeck*, 156 N. Y. 341; *Hamlin v. Hamlin*, 117 App. Div. (N. Y.) 193; *Schaffer v. Reilly*, 50 N. Y. 61; *Ruckman v. Ruckman*, 32 N. J. Eq. 259; *Vought's Exrs. v. Vought*, 50 N. J. Eq. 177 (holding that where a deed from husband to wife remained in his custody, evidence that he managed the property as agent of his wife established a legal delivery though no manual delivery had taken place); *Moore v. Hazleton*, 91 Mass. 102 (holding that where a guardian executed an assignment of a mortgage to his ward to secure money due the ward from the guardian, delivery took place though the instrument remained in the guardian's hands, his intent that it should take effect at once being shown); *Lundy v. Mason*, 174 Ill. 505; *Mc Elroy v. Hines*, 133 Ill. 156;

Thatcher v. St. Andrew's Church, 37 Mich. 264; *Newton v. Bealer*, 41 Iowa 334; *Mallett v. Page*, 8 Ind. 364; *Dukes v. Spangler*, 35 Oh. St. 119; *Conlon v. Grace*, 36 Minn. 276; *Blight v. Schenck*, 10 Pa. St. 283.

Where the instrument remains in the possession of the grantor and the intention that it take effect at once is not affirmatively established, it is void for non-delivery. *Ten Eyck v. Whitbeck*, 156 N. Y. 341 (holding that the presumption that the instrument was delivered and accepted as of its date, and possible similar presumption arising out of its having been recorded, is overthrown by evidence that deed was never delivered shown by continued possession and use of property by the grantor); *Hall v. Hall*, 41 N. Y. 416; *Lundy v. Mason*, 174 Ill. 505; *Morris v. Caudle*, 178 Ill. 1; *Guernsey v. Black Diamond, etc. Co.*, 99 Iowa 471; *Patterson v. Snell*, 67 Me. 559 (intended as testamentary disposition); *Mills v. Gore*, 20 Pick. (Mass.) 28; *Duraind's App.* 116 Pa. St. 93.

grantor's intent to that effect is in some way clearly expressed,² though a mere corporeal delivery to such a third person without such expression of intent will not amount to a delivery in the legal sense, the corporeal delivery being of value only, in connection with some statement of the grantor's intent, as further evidence that a legal delivery of the deed was intended.³

Corporeal delivery to the grantee is presumptively a legal delivery in the absence of intent to the contrary, but if it be shown that the instrument was given to the grantee for some special purpose, without intent to make it presently effective as a conveyance, no delivery takes place.⁴ Of

2. *Jones v. Swayze*, 42 N. J. L. 279; *Merrills v. Swift*, 18 Conn. 257; *Greene v. Conant*, 151 Mass. 223; *Mitchell v. Ryan*, 3 Oh. St. 377; *Miller v. Meers*, 155 Ill. 289; *Church v. Gilman*, 15 Wend. (N. Y.) 656; *Diefendorf v. Diefendorf*, 132 N. Y. 100; *Booker v. Booker*, 119 App. Div. (N. Y.) 482.

3. *Shepard's Touchstone*, 57, 58, quoted in *Mitchell's Lessee v. Ryan*, 3 Oh. St. 377, and *Merrills v. Swift*, 18 Conn. 257, holding, however, that the delivery was good as the intent to deliver had been sufficiently expressed; *Chauncey v. Arnold*, 24 N. Y. 330; *Maynard v. Maynard*, 10 Mass. 456.

Delivery by the grantor to the recording officer for record in behalf of the grantee is a good legal delivery, and the general rule seems to be that legal delivery will be presumed where the deed has been recorded. *Mitchell's Lessee v. Ryan*, 3 Oh. St. 377 (the court saying: "Very clear proof ought to be made, to warrant a court in holding that a man who has executed and acknowledged a deed, and caused it to be recorded, did not mean thereby to part with

his title. If such deeds could be overthrown by slight testimony, a door would be open to the grossest fraud"); *Mallett v. Page*, 8 Ind. 364; *Pool v. Davis*, 135 Ind. 323; *Blight v. Schenck*, 10 Pa. St. 285; *Farlee v. Farlee*, 21 N. J. L. 279; *Patrick v. Howard*, 47 Mich. 40; *Wilcox v. Drought*, 71 App. Div. (N. Y.) 402.

But where such delivery for record is shown affirmatively to have been for some special purpose, without intent to pass title, no delivery takes place. See *Jackson d. Eames v. Phipps*, 12 Johns. (N. Y.) 408; *Smith v. South Royalton Bank*, 32 Vt. 341; *Derry Bank v. Webster*, 44 N. H. 264.

In *Commercial Bank v. Reckless*, 5 N. J. Eq. 430, the court held that no delivery took place, it not appearing affirmatively that the recording officer was directed to deliver to the grantee, and in *Barnes v. Barnes*, 161 Mass. 381, delivery for record was also treated like delivery to any third person—affirmative expression of intent to make the deed presently effective must be shown in addition to the mere recording of the instrument.

course where manual possession of the instrument is secured by the grantee through fraud, or without the knowledge or consent of the grantor, no delivery has occurred, and the instrument remains inoperative for any purpose.⁵

Delivery to the grantee personally subject to some contingency, the delivery to become effective only on the happening of the contingent event so provided for, operates as an absolute delivery, the condition being void.⁶ A conditional delivery to be effective as such must be made to a third person, in escrow as it is generally termed.⁷ All other instruments, including ordinary written contracts, negotiable paper, and instruments of any kind whether under seal or not, exclusive of deeds and conveyances of realty, may be delivered conditionally directly to the party interested, delivery in escrow not being required, and parol evidence is admissible to prove that the delivery was conditional.⁸

§ 328. Delivery in Escrow.—The delivery of a deed to a third party to be held by him and delivered to the grantee upon the happening of some condition, such as the payment of the purchase price or other act to be performed by the grantee, or upon the happening of some collateral event, such as the death of the grantor, is a delivery in escrow

4. *Braman v. Bingham*, 26 N. Y. 483; *Dietz v. Farish*, 44 N. Y. Super. Ct. 190; *Graves v. Dudley*, 20 N. Y. 76; *Curry v. Colburn*, 99 Wis. 319; *Comer v. Baldwin*, 16 Minn. 172; *Bovee v. Hinde*, 135 Ill. 137.

5. *Major v. Todd*, 84 Mich. 85; *Lundy v. Mason*, 174 Ill. 505; *Santer v. Dollman*, 46 Minn. 504; *Fitzgerald v. Goff*, 99 Ind. 28; *Tisher v. Beckwith*, 30 Wis. 55.

6. *Co. Litt.* 36a; *Whyddon's case*, 2 Cro. Eliz. 520; *Ward v. Lewis*, 4 Pick. (Mass.) 518; *Blewitt v.*

Boorum, 142 N. Y. 357 (the law declared to be so settled whatever the reason and irrespective of whether the distinction has any sound basis or not); *Holbrook v. Truesdale*, 100 App. Div. (N. Y.) 295; *Baker v. Baker*, 159 Ill. 394; *Dawson v. Hall*, 2 Mich. 390; *Hinchliff v. Hinman*, 18 Wis. 130.

7. See § 328, *post*.

8. *Niblock v. Sprague*, 200 N. Y. 390; *Stiebel v. Grosberg*, 202 N. Y. 266.

See, also, cases in note 6, *supra*.

or conditional delivery. The third person holds the deed as agent or trustee for the grantee, and must deliver it to him upon the happening of the contingency involved. Upon the second delivery the deed takes effect as of the date of the original delivery to the third person." The question of the effect of a deed, mortgage, judgment or other lien, delivered or taking effect after the first and before the final delivery, or before the happening of the contingency or event upon which final delivery is to be made, upon the title of the grantee under the deed of escrow, presents difficulties on which

1. A distinction is sometimes made between a delivery to a third person on condition, to take effect presently as the deed of the grantor, and a similar delivery intended to operate only as an eschew, and to operate as a deed only on the final delivery to the grantee. See *Wheelwright v. Wheelwright*, 2 Mass. 447; *Hathaway v. Payne*, 34 N. Y. 92, at pp. 106, 107; *Taft v. Taft*, 59 Mich. 185. It is clear no real distinction exists in such case, or in the case of a delivery subject to a condition as distinguished from a delivery to a third person the deed to be delivered on the death of the grantor or on any other event sure to happen. In either case to operate as a delivery at all the control of the instrument is given up absolutely by the grantor. If he retains the right to recall the instrument he makes the third person his agent or depository and the deed is no more effective than if it remained in his own hand. (See note following.)

If a valid delivery in escrow has been made the grantee acquires certain rights, conditional when the final delivery is subject to some condition, absolute, but only deferred in their enjoyment when the final delivery is to take place on an event sure to hap-

pen. In either case the final delivery operates by relation from the first delivery because the future rights of the grantee, whether contingent or vested, which have matured into full ownership on the final delivery, are created by the first delivery. Both cases are governed by identical principles. *Stonehill v. Hastings*, 202 N. Y. 115; *Cook v. Brown*, 34 N. H. 460; *State Bank v. Evans*, 15 N. J. L. 155; *Hall v. Harris*, 5 Ired. Eq. (N. C.) 303; *Foster v. Mansfield*, 3 Met. (Mass.) 412; *Stone v. Duvall*, 77 Ill. 475; *Baker v. Baker*, 159 Ill. 394; *Bury v. Young*, 98 Cal. 446; *Prustman v. Baker*, 30 Wis. 649. The last two cases take the position that where the second delivery is to be made on the death of the grantor, the legal effect is that the grantor has reserved a life estate in himself and has conveyed a vested future estate in fee to the grantee, absolute on the first delivery. It would seem obvious that the second delivery in either case is a formal matter merely, since on the happening of the condition or event the estate of the grantee becomes absolute before the second delivery has actually been made. See *Davis v. Clark*, 58 Kan. 100, at p. 106.

the courts are not in accord. The question turns on the effect of the first delivery upon the title of the grantor. There can be no doubt that the result is to divest him of control of the deed, and also of control of the title, which vests absolutely in the grantee on the happening of the event or contingency on which the second delivery is to take place. If the grantor reserves the right to revoke or recall the instrument before the final delivery there is no delivery at all, either complete or in escrow.² On the other hand the legal title in the technical sense does not pass to the grantee until the condition or event happens on which the delivery depends. During the interval the grantee has a present right subject to a condition of which he cannot be deprived by the grantor, a right which is perfectly good at law as well as in equity. The technical legal title necessarily remains in the grantor since it has not passed to the grantee. This title of the grantor is subject to be defeated by the actual taking effect of the conditional legal interest or estate of the grantee on the happening of the contingency or the event provided for, and then vests absolutely in the grantee by virtue of and as of the date of the original delivery.³ It is sound law that as between the original parties, or in the case of any but a subsequent purchaser for value without notice, a subsequent deed or mortgage executed and delivered by the grantor prior to the happening of the contingency provided for in the deed of escrow is void as to the

2. *Cook v. Brown*, 34 N. H. 460; *Bury v. Young*, 98 Cal. at p. 451 (the court saying: "The essential requisite [to a delivery in escrow] is that when it is placed in the hands of the third party, it has passed beyond the control of the grantor for all time"); *Prustman v. Baker*, 30 Wis. 644; *Maynard v. Maynard*, 10 Mass. 456; *Stanton v. Miller*, 58 N. Y. 192; *Rochester Sav. Bank v. Bailey*, 34 Misc. (N. Y.) 247, aff. 70 App. Div.

622; *Burnham v. Burnham*, 58 Misc. (N. Y.) 385, aff. 199 N. Y. 592.

3. *Daggett v. Daggett*, 143 Mass. 516; *Fitch v. Miller*, 200 Ill. 170; *Ogden v. Ogden*, 4 Oh. St. 182.

See, also, last two notes. The grantee's interest during such interval very closely resembles a future executory interest in fee, in the case of a fee upon a fee or conditional limitation.

grantee under the deed of escrow on the happening of the contingency though there are decisions and *dicta* to the contrary.⁴ It is also clear that if the deed of escrow is not recorded it will be void under the recording acts as against a subsequent purchaser or encumbrancer for value and without notice. If it is recorded, or if no recording act applies to the case and it is unrecorded, as a matter of sound principle there can be no doubt that the subsequent deed or mortgage of the grantor or a subsequent judgment lien is void whether made to an innocent purchaser for value or not. The reason is that the grantee under the escrow takes a contingent legal interest in the property, something more than a mere equity, which is not cut off by conveyance to such innocent purchaser.⁵

4. Shep. Touch. 59; *Hall v. Harris*, 5 Ired. Eq. (40 N. C.) 303; *Shirley's Lessee v. Ayres*, 14 Oh. 307; *Price v. Pittsburgh, etc. R. Co.*, 34 Ill. 13. See *Taft v. Taft*, 59 Mich. 185, holding that the deed relates back to overcome disabilities, etc., not to overcome intervening rights, based on the distinction referred to in note 1, *supra*, which, we have seen, has no substantial foundation and is not generally followed. See, also, *dicta* to same effect in *Prustman v. Baker*, 30 Wis. 644, and decision to same effect in *Jackson v. Rowland*, 6 Wend. (N. Y.) 666.

5. The state of the authorities on this question is exceedingly unsatisfactory. The right position was taken in *Hall v. Harris*, 40 N. C. 303, cited in the preceding note, the court saying: "We are satisfied from principle and from a consideration of the authorities, that when a paper is signed and sealed and handed to a third person to be handed to another upon a condition, which is afterwards

complied with, the paper becomes a deed by the act of parting with the possession, and takes effect presently, without reference to the precise words used, unless it clearly appears to be the intention, that it should not then become a deed, and this intention would be defeated by treating it as a deed from that time, as, if, no fraud being suggested, the paper is handed to the third person before the parties have concluded the bargain, and fixed upon the terms." The cases cited in the preceding note do not determine the question where the grantor conveys to a purchaser for value without notice before the happening of the event on which the final delivery depends, and no cases have been found which actually decide this question, the cases cited in the books on this matter not being in point. There can be no doubt that the line of cases holding or suggesting that the final delivery relates back only to overcome disabilities arising in the grantor after the first delivery, such as his

Delivery of the deed by the depository to the grantee before the happening of the event so provided for does not in any way change the contingent interest of the grantee. He does not get title to a present estate and therefore cannot convey the property to a third person. If in such case he should convey to an innocent purchaser for value the best considered cases hold that he can convey only such interest as he has, and if the contingency or event on which his title under the deed depends, fails to happen, his grantee takes nothing, though an innocent purchaser for value. The legal title to the property has not passed, and the conveyance is absolutely void as a conveyance of a present estate.⁶ In

death or insanity or coverture of a woman grantor, stand expressly or impliedly for the rule that all intervening rights, whether of attaching creditors or purchasers or mortgagors, defeat the title under the deed of escrow, whether such intervening parties are purchasers for value or not.

It is submitted, however, that these cases are based on an obvious misapprehension of the purpose and effect of a delivery of a deed in escrow. It is unquestioned that the grantor cannot withdraw the instrument; that in spite of any attempted revocation or withdrawal of the instrument by him title vests absolutely in the grantee on the happening of the contingency involved. If this means anything it means that the grantee gets by the first delivery a future executory interest or estate in the property, something more than a mere equitable contractual right, contingent if the deed is to vest the estate in him on the happening of a contingency, vested, but still future if the event is sure to happen, as for instance where the deed

is to be delivered to him on the death of the grantor. How can an attaching creditor, purchaser or mortgagee get any greater right than that of the grantor? Assuming that the deed of escrow is recorded so as to give constructive notice under the recording acts, there is no valid reason why this interest of the grantee should be in any way affected by a subsequent deed or mortgage executed by the grantor or by a judgment or other lien attaching to the property after the first delivery and before the happening of the event or contingency on which the estate of the grantee is to become absolute. Properly there is no technical relating back of the second delivery to take effect as of the time of the first delivery. There is no need to appeal to any fiction. The grantee has an actually existing right throughout, which becomes a vested and present right on the happening of the contingency or event involved.

6. *Black v. Shreve*, 13 N. J. Eq. 455; *Jackson v. Rowley*, 88 Iowa 184; *Hinman v. Booth*, 21 Wend. (N. Y.) 267; *Smith v. South Royalton Bank*,

several states it is held, however, that the depository is the agent of the grantor, and the grantor is liable for his act in delivering the deed before the time fixed, or that the grantor by delivering the deed in escrow has made it possible for the depository and the grantee by their fraud to mislead and injure an innocent third person, the courts deciding that the grantor should be bound, applying the alleged principle that where one of two innocent persons must suffer that one should be held who has made it possible to injure or defraud the other.⁷ It is perfectly well settled that this principle is meaningless except in cases where the legal title has passed to an innocent purchaser, which is not the situation in this case, or where a case of equitable estoppel exists. But the grantor is no more responsible for the premature delivery than he would be in case the instrument had been stolen from his desk. There is no negligent or wrongful act on his part which can be the basis of an estoppel. The injured purchaser has his remedy against the persons who have wronged him, not against the owner of the property so conveyed who is in no sense a party to the fraud.

§ 329. Acceptance by Grantee.— On principle and by the weight of authority acceptance by the grantee is not essential to the validity of a conveyance. It is generally stated that acceptance will be presumed where the conveyance is of material advantage to the grantee, and is effective from the time of delivery unless it be shown that the grantee has actually refused to receive it.¹ A conveyance

32 Vt. 341; *Everts v. Agnes*, 6 Wis. 463; *Calhoun Co. v. Am. etc. Soc.*, 93 U. S. 127.

7. *Schurtz v. Colvin*, 55 Oh. St. 274; *Blight v. Schenck*, 10 Pa. St. 285; *Quick v. Milligan*, 108 Ind. 419.

1. *Mitchell's Lessee v. Ryan*, 3 Oh. St. 377, the court saying: "How much weight this argument is en-

titled to (viz., that an estate cannot be thrust upon a man against his will and therefore actual assent is necessary), may be judged of by the fact that estates are every day thrust upon people by last will and testament. * * * Neither will it be denied that equitable estates are every day thrust upon people by deeds, or as-

is in no sense a contract, involving as it does only the present transfer of title and ownership of land, and as no element of mutual assent or agreement is necessarily involved, the actual concurrence of the grantee is in no way essential to the immediate effectiveness of a deed. In several states, however, it is held that an actual acceptance is necessary, and though such acceptance will be presumed from a valid delivery, nevertheless this presumption may be rebutted by evidence that the grantee knew nothing thereof, or by other evidence proving that there has been no acceptance in fact.²

Undoubtedly rejection or affirmative refusal to accept the deed makes it void from the beginning.³ So, also, where the deed is not a pure gift, but imposes a burden on the grantee which he may or may not assume, according to many of the cases acceptance will not be presumed,⁴ though if acceptance subsequently takes place, the deed operates from the time of its delivery before such acceptance was given. It would seem, therefore, as a practical matter, that

signments, made in trust for their benefit, nor will it be said that such beneficiaries take nothing until they assent. Add to these the estates that are thrust upon people by the statute of descent, and we begin to estimate the value of the argument, that a man shall not be made a property holder against his will"); *Church v. Gilman*, 15 Wend. (N. Y.) 656; *Spencer v. Carr*, 45 N. Y. 406; *Everett v. Everett*, 48 N. Y. 218; *Moore v. Giles*, 49 Conn. 570; *Merrills v. Swift*, 18 Conn. 257; *Jones v. Swayze*, 42 N. J. L. 279; *Greene v. Conant*, 151 Mass. 223; *Moore v. Hazleton*, 9 Allen (Mass.) 102; *Hall v. Harris*, 5 Ired. Eq. (40 N. C.) 303.

2. *Welch v. Sackett*, 12 Wis. 243 (decision based on the erroneous notion that a deed is a contract); *Hu-*

lick v. Seovil, 9 Ill. 159; *Moore v. Flynn*, 135 Ill. 74 (holding that no presumption of acceptance exists where grantee had no notice of the deed); *Watson v. Hillman*, 57 Mich. 607; *Woodbury v. Fisher*, 20 Ind. 387; *Hibbard v. Smith*, 67 Cal. 547; *Day v. Griffith*, 15 Iowa 104; *Cravens v. Rossiter*, 116 Mo. 338. The last two cases hold that a subsequent acceptance by the grantee does not relate back so as to cut off intervening rights or liens.

3. See cases in note 1, *supra*.

4. *Derry Bank v. Webster*, 44 N. H. 264; *Mitchell's Lessee v. Ryan*, 3 Oh. St. 377; *Johnson v. Farley*, 45 N. H. 505; *Jackson v. Bodle*, 20 Johns. (N. Y.) 184. See, also, cases in notes 1 and 2, *supra*.

delivery transfers title in such cases as well as in cases of pure gift, subject to the right of the grantor to make it void by subsequently rejecting it.

It is accepted everywhere as the rule that delivery to an infant or insane person will be presently effective without an acceptance, establishing beyond question that there is nothing in the nature of a conveyance which makes acceptance essential to its validity as a present transfer of title.⁵ The fact that devises by will pass title without acceptance, that acceptance is not essential to the devolution of title by inheritance, that trusts are valid when created by deed without acceptance, make irresistible the conclusion that the cases making actual acceptance essential to the validity of a deed are not sound.⁶

5. *Miller v. Meers*, 155 Ill. 284, 295; *Campbell v. Kuhn*, 45 Mich. 513, and cases therein cited.

6. See *Mitchell's Lessee v. Ryan*, 3 Oh. St. 377, quoted from in note 1, *supra*.

CHAPTER XXII.

RECORDING OF DEEDS AND CONVEYANCES.

§ 330. The Recording Acts; General Purpose and Effect.

— Apart from the recording acts priority between deeds, mortgages, judgments and other liens or titles, is determined by the order in point of time in which they become effective. Where A conveys land by a valid deed to B, and later conveys or mortgages the same land to C, nothing passes to C since A had nothing to convey to him, having already conveyed the same property to B. So, if A mortgages the land to B and later conveys or mortgages it to C, the right secured by C is subject to B's mortgage. This is true though C be a purchaser for value without notice of B's deed or mortgage. The doctrine that a purchaser for value without notice will be protected against prior claims applies only to cases where the legal title has passed to such purchaser and the prior claims are equitable and not legal rights. This doctrine is purely equitable, equity refusing to disturb the legal title by enforcing a prior equity where such title is held by a purchaser for value without notice. Apart from the statutes, therefore, a valid title or lien existing and enforceable at law is never cut off or affected by a subsequent deed or mortgage executed by the same vendor or owner to another person, whether a purchaser for value or not.

The object of the recording acts, in effect generally throughout the United States, is to create a permanent record of title to real property which may be examined by any subsequent purchaser or incumbrancer, disclosing the ownership of the property, and all restrictions, limitations or liens upon it, and to protect all subsequent purchasers or incumbrancers for value from all outstanding conveyances, mortgages, or other liens which have not been recorded and of which they have no notice.

These statutes generally provide that a deed, mortgage or other instrument affecting the title to land may be recorded if duly executed and acknowledged; that if any such instrument is not recorded it shall be void as against any subsequent purchaser, for value and without notice, of the same real property from the same grantor or mortgagor, provided the subsequent deed or mortgage is first duly recorded.¹ Thus if A conveys land to B, who fails to record his deed, and later A conveys the same property to C, who pays for it in good faith without notice of the prior deed, and duly records his deed before B records his, C's deed is good and B's deed is void as against C. The statute alone accomplishes this result, as in the absence of statute B's deed would be good and C's deed would be void, because A, having conveyed the property to B, would have no title which he could convey to C.

The unrecorded deed or mortgage is good as against the grantor or mortgagor and as to all other persons except a subsequent innocent purchaser or encumbrancer for value.² By express statutory provision in two or three states instruments of conveyance are declared to be void until recorded,³ but in nearly every state the purpose of the statute is to protect subsequent innocent purchasers and incumbrancers for value only, and the unrecorded instrument is valid as against all others.

§ 331. Instrument that Must be Recorded.—The statutes generally provide that all deeds, mortgages and written

1. See references to statutes and decisions thereunder in notes under sections following.

2. Stim. Am. St. L. § 1611 B; Wood v. Chapin, 13 N. Y. 509; McLaughlin v. Ihmcen, 85 Pa. St. 364, and cases in notes under sections following.

3. See Nickel v. Brown, 75 Md. 172. That mortgages must be recorded so

as to become effective as against any subsequent purchaser whether for value without notice or not, see Holliday v. Franklin Bank, 16 Oh. 533; Mayham v. Coombs, 14 Oh. 428; Quinnerly v. Quinnerly, 114 N. C. 145. That such mortgage is valid as between immediate parties though not recorded, see Building, &c. Assn. v. Clark, 43 Oh. St. 427.

instruments by which any estate or interest in land is created, transferred, mortgaged, or assigned, or by which the title to any real property may be affected, must be recorded, except leases for three years or less, powers of attorney to convey, and executory contracts for the sale of land.⁴ Wills need not generally be recorded under the recording acts, but their record is provided for by special statutes relating to wills and surrogate or probate courts.⁵ Leases and mortgages of leasehold interests for over three years (or for such other period as may be provided by the statute in any state), must be recorded, like deeds or mortgages of freehold estates.⁶ Powers of attorney to execute conveyances may be recorded, but they need not be in most states. If recorded in such states the power remains good and effective so that innocent purchasers for value without notice of revocation of the powers are protected until a revocation thereof has been duly recorded.⁷ In some states they must be recorded like conveyances or mortgages.⁸ Executory contracts of sale may also be recorded, though such record is not required, and therefore the recording of

4. N. Y. Real Prop. Law, § 290; Stim. Am. St. § 1611 A, § 1611 B. See statutes in the different states.

Instruments which must be recorded include: Deeds of referees and sheriffs, *Hetzel v. Barber*, 69 N. Y. 1; Assignments of mortgage and satisfaction pieces, *Gibson v. Thomas*, 85 App. Div. (N. Y.) 243, and *Bacon v. Van Schoonhoven*, 87 N. Y. 446; Release of mortgages, *Frear v. Sweet*, 118 N. Y. 454; extension of mortgages, *Wiedeman v. Zielinska*, 102 App. Div. (N. Y.) 163; covenants affecting the title, as by creating easements. *Bradley v. Walker*, 138 N. Y. 291; *Hunt v. Johnson*, 19 N. Y. 279; written sale of growing timber to be removed by vendee, *Vorebeck v. Roe*, 50 Barb. (N. Y.) 308;

written sale of marl (part of the soil), *Locustrine Fertilizer Co. v. Lake Guano & F. Co.*, 82 N. Y. 476.

5. N. Y. Real Prop. L., § 290, and statutes in the different states. As to recording of wills in Surrogate's Court, see N. Y. Code Civ. Proc., §§ 2498, 2499.

6. N. Y. Real Prop. L., § 290, and statutes in the different states.

7. N. Y. Real Prop. L., §§ 290, 294, and statutes in the different states.

8. In Massachusetts and several other states powers of attorney must be recorded to make the record of any instrument executed thereunder constructive notice thereof under the statute. See Stim. Am. St. L. §§ 1624 (10), 1670.

them does not give constructive notice to subsequent purchasers. If duly recorded, however, their record will usually give actual notice thereof to any purchaser who examines the title.⁹ In some states they must be recorded like other instruments of conveyance.¹⁰

Deeds or other instruments creating or transferring equitable estates are included within the recording acts, and must be recorded like conveyances affecting the legal title.¹¹

§ 332. What Constitutes Subsequent Purchaser Without Notice.—The statutes make the prior unrecorded deed or other instrument of title void as to subsequent purchasers or encumbrancers in good faith for value from the same grantor or mortgagor of the same real property. A purchaser in good faith is one who purchase or acquires an interest in the property without notice of the unrecorded instrument. He has notice in all cases where he has actual knowledge of the existence of the instrument, and also where he has knowledge of facts which should induce him as a man of average prudence to inquire as to its existence, provided such inquiry, prosecuted with reasonable diligence, would result in its discovery.¹ Mere rumor of an indefinite claim

9. N. Y. Real Prop. L., §§ 290, 294; *Boyd v. Schlesinger*, 56 N. Y. 301. See cases cited on this question in 24 Am. & Eng. Cyc. Law, 81.

10. *Kent v. Williams*, 146 Cal. 3.

11. *Tarbell v. West*, 86 N. Y. 280 (mortgage by partner of his equitable interest in firm property, legal title being in copartner); *Hunt v. Johnson*, 19 N. Y. 279; *Wilder v. Brooks*, 10 Minn. 50; *Edwards v. McKernan*, 55 Mich. 520 (holding that where owner of the equitable title made and recorded a mortgage thereof, and later acquired the legal title, subsequent purchaser of the legal title must search back against

name of the legal owner for possible mortgages in deeds made by such owner before he got title. The better rule, laid down in *Tarbell v. West*, *supra*, is that such instrument is notice of record only to a subsequent purchaser of the equitable, not the legal title).

1. N. Y. Real Prop. L., § 291; *Williamson v. Brown*, 15 N. Y. 354; *Davis v. Kennedy*, 105 Ill. 300 (statement of claimant at time of subsequent sale); *Condit v. Wilson*, 36 N. J. Eq. 370; *Paul v. Connersville, etc. Co.*, 51 Ind. 527 (existence of railroad tracks on land purchased, notice of possible rights of others in

or right existing in a third person is not notice.² But actual definite information from any credible source, though the person giving the information be an entire stranger to the three parties involved, will be notice depriving him of the protection of the statute if by reasonable investigation he can discover whether the information is accurate or not.³ It seems to be immaterial whether the statute prescribes "actual notice" or merely "notice" of the prior instrument, the subsequent purchaser being held as having actual notice in all cases where he has knowledge of such facts as would induce the man of average prudence to investigate the matter where such investigation would result in the discovery of the prior unrecorded instrument. He has actual notice of everything which he knows or ought to know or discover, acting as a reasonable man.⁴ In Massachusetts, however, the expression "actual notice" is strictly construed; knowledge of facts which on investigation would lead to the discovery of the former instrument will not do.⁵

land for railroad purposes); *Brinkman v. Jones*, 44 Wis. 498 (actual notice shown by notice of facts putting prudent man upon inquiry which would disclose actual existence of prior right); *Drey v. Doyle*, 99 Mo. 459; *Clark v. Holland*, 72 Iowa 34; (last two cases notice from recitals in recorded instruments referring to rights or instruments not in record, puts subsequent purchaser upon inquiry). See, also, cases in notes following.

2. *Condit v. Wilson*, 36 N. J. Eq. 370 (vague general statement some time before that property was mortgaged for all that it was worth, made to discourage a suit against him); *Maul v. Rider*, 59 Pa. St. 167; *Chicago v. Witt*, 75 Ill. 211; *Shepard v. Shepard*, 36 Mich. 173; *Smith v. Yale*, 31 Cal. 180.

3. *Cox v. Milner*, 23 Ill. 476 (where he hears of prior sale from any source entitled to reasonable credence, he has notice); *Butcher v. Yocum*, 61 Pa. St. 168; *Lawton v. Gordon*, 37 Cal. 202 (statement as to prior conveyance by recorder of deeds); *Jaeger v. Hardy*, 48 Oh. St. 335. In *Jackson, etc. R. Co. v. Davison*, 65 Mich. 416, the court held that statement that some sort of claim existed without specifying what it was put the subsequent purchaser upon inquiry, the court rejecting the narrower rule of some of the other cases that the statement must be definite.

4. See cases in note 1, *supra*.

5. *Lamb v. Pierce*, 113 Mass. 72. holding that open and notorious possession, or of other facts which, on investigation, would lead to discov-

Possession by the grantee under the unrecorded conveyance, is *prima facie* notice to the world of his interest in the property, and therefore the subsequent purchaser is charged with notice, *prima facie*, in every case of such possession.⁶ It is immaterial whether the subsequent purchaser has actual knowledge of such possession, because of his absence or for any other cause; actual unqualified possession by the first purchaser as owner under his deed is notice of his rights to the subsequent purchaser, whether the latter knows of such possession or not.⁷ But the *prima facie* presumption of notice arising from possession may be rebutted by evidence showing that the possession was equivocal, as where the first purchaser is in common possession with his grantor, or where it is apparently for some special or temporary purpose consistent with the title of the grantor, as his caretaker, tenant, or the like.⁸ In all case of

ery of the prior right, is not "actual notice." See *Curtis v. Mundy*, 3 Metc. (Mass.) 405, holding that "actual notice" does not mean "certain knowledge." Information from a third party is sufficient if it be express and definite, and is such that it would ordinarily be relied and acted on.

6. *Phelan v. Brady*, 119 N. Y. 587; *Ward v. Met. St. R. Co.*, 152 N. Y. 39 (possession of rights acquired by Dept. Co. through unrecorded release of easements of light, air and access, was notice thereof to subsequent purchaser of the land); *Williamson v. Brown*, 15 N. Y. 354; *Hodge's Exr's v. Amerman*, 40 N. J. Eq. 99, and cases in notes following.

7. *Hottenstein v. Lerch*, 104 Pa. St. 454; *Ranney v. Hardy*, 43 Oh. St. 157; *Hodge's Exr's v. Amerman*, 40 N. J. Eq. 99.

Where the statute specifies ab-

sence of "actual notice," actual knowledge of such possession must be shown. *Brinkman v. Jones*, 44 Wis. 498; *Porter v. Levey*, 42 Me. 519; *McLaughlin v. Shepherd*, 32 Me. 143.

In Massachusetts in addition to possession there must be additional facts indicating the existence of the former instrument brought home to the subsequent purchasers, equivalent to actual notice. *Pomroy v. Stevens*, 11 Met. 244. See note 5, *supra*.

8. *Brown v. Volkenning*, 64 N. Y. 76 (possession through presence of workmen of grantee finishing incomplete house, one of many being erected in a row by the grantor, was equivocal, and therefore not notice); *Gibson v. Thomas*, 85 App. Div. (N. Y.) 243 (possession by subsequent grantee not notice of prior unrecorded release of mortgage as to assignee of mortgage. Possession en-

indirect notice from facts inducing inquiry, including notice from possession, if the subsequent purchaser investigates the matter as fully as could be expected of the average man without discovering the existence of the prior instrument, he is a purchaser in good faith and without notice.⁹

Where the grantor continues in possession a subsequent purchaser from his grantor may rely on the record title; the grantor's continued possession gives no notice of any undisclosed right retained by him.¹⁰ In some states, however, the courts hold that open possession adverse to his grant by the grantor is notice of any right reserved by him, as against such subsequent purchaser.¹¹

As a tenant's possession is that of his landlord, possession by a tenant of the holder of the unrecorded instrument is notice for the same reasons and subject to the same limitations as in the case of possession by such prior claimant himself.¹²

We have seen that a quitclaim deed just as effectually conveys the property described therein as a deed of warranty, and that, in effect, any deed without covenants is a quitclaim deed.¹³ But because such deeds are generally used in the conveyance of land held by a defective title some cases hold that the mere use of that form of deed puts the

tirely consistent with existence of mortgage lien); *Pope v. Allen*, 90 N. Y. 298 (possession in common with grantor); *Truesdale v. Ford*, 37 Ill. 210 (possession in common with grantor); *Harris v. McIntyre*, 118 Ill. 275 (same as preceding case); *Smith v. Yule*, 31 Cal. 180 (another case of joint possession).

9. *Williamson v. Brown*, 15 N. Y. 354 (if subsequent purchaser put upon inquiry makes investigation with due diligence without discovering the existence of the unrecorded conveyance, he has no notice and is protected); *Brinkman v. Jones*, 44

Wis. 498. See cases in notes 1 and 8, *supra*.

10. *Van Keuren v. Central R. of N. J.*, 38 N. J. L. 165; *Bloomer v. Henderson*, 8 Mich. 395.

11. *Pell v. McElroy*, 36 Cal. 268; *Ill. Cent. R. Co. v. McCullough*, 59 Ill. 166.

12. *Phelan v. Brady*, 119 N. Y. 587; *Hottenstein v. Lerch*, 104 Pa. St. 454; *Tilloston v. Mitchell*, 111 Ill. 518; *Hanly v. Morse*, 32 Me. 287 (actual knowledge of such possession on part of subsequent purchaser must be shown).

13. See § 317, *ante*.

grantee upon inquiry, and is notice of any defect which such inquiry should disclose if prosecuted with reasonable diligence.¹⁴ To conclude that the title is probably defective because a quitclaim deed is used in conveying the property to the grantee, or because the grantor or a predecessor took by such a deed, is extremely far fetched, and the more reasonable and more commonly accepted rule is that no notice of any defect in title arises out of the use of that form of deed.¹⁵

§ 333. What constitutes Purchaser for Value.—The subsequent purchaser must actually part with value, money or money's worth, in return for the conveyance to him in order to be able to assert his claim as against a prior unrecorded instrument from the same vendor. A mere gift is not protected by the recording acts as against the real owner or encumbrancer under the prior deed or mortgage.¹ A merely nominal consideration recited and actually paid, as of one dollar, or ten dollars, is not value within the act, as the transaction is essentially a gift which the statute does not protect.² A deed or mortgage given to pay or secure a past indebtedness is not protected by the statute, since the subsequent grantee has not parted with anything of value, and therefore has not changed his position in any way, as he may enforce collection of the debt as before, it appearing

14. *Johnson v. Williams*, 37 Kan. 179, and long list of cases therein cited; *Peters v. Cartier*, 80 Mich. 124 (argument based on general use of quitclaim deeds where title is not good.) In *Meikel v. Borders*, 129 Ind. 529, the court held that a purchaser by warranty deed is protected though his grantor took title by a quitclaim deed, though it is not obvious why the use of the quitclaim should not have aroused his suspicions in that case as well as when used in the conveyance to himself. It

is reasonably apparent that a deed without covenants is used in any case because the grantor does not care to assume possible liability arising from unknown defects in the title which may later come to light.

15. *Moelle v. Sherwood*, 148 U. S. 21; *Nidever v. Ayres*, 83 Cal. 39; *Brown v. Banner, etc. Co.*, 97 Ill. 214.

1. *Ten Eyck v. Witbeck*, 135 N. Y. 401, and cases therein cited. See cases in notes following.

2. *Ten Eyck v. Witbeck*, 135 N. Y. 401, and cases therein cited.

that the deed or mortgage to him was void because of a prior unrecorded deed.³ But if he has given a binding extension of time in consideration of the mortgage, or has surrendered any collateral security or other valuable right, he has parted with value and if he has taken without notice of the prior unrecorded instrument his deed or mortgage is valid under the statute, and the prior unrecorded instrument is void as to him.⁴

Why should an extension of time be treated as value in these cases? If the deed or mortgage given therefor is void because of lack of title in the grantor or mortgagor, the subsequent grantee or mortgagee may at once repudiate the extension of time and enforce the collection of the debt.

3. *Cary v. White*, 52 N. Y. 138; *Westbrook v. Gleason*, 79 N. Y. 23; *Clark v. Mackin*, 95 N. Y. 346; *Howells v. Hettrick*, 160 N. Y. 308; *Gilchrist v. Gough*, 67 Ind. 576; *Boxheimer v. Gunn*, 24 Mich. 372.

In several cases it has been decided that if the prior debt is released or discharged in consideration of the subsequent deed or mortgage, the giving up of the debt is value within the meaning of the statute. *Adams v. Vanderbeck*, 148 Ind. 92; *Busey v. Reese*, 38 Md. 264. It is submitted that the debt is not in fact paid where the deed or mortgage turns out to be void because of failure of title of the grantor or mortgagor, and therefore the subsequent purchaser or mortgagee has parted with nothing and in no way changed his position. It is obviously unjust and immoral to give effect to such a transaction, deprive the first grantee of his property because of mere failure to record, treat the debtor of the fraudulent grantor as discharged, and title as vesting in the subsequent grantee by force of

the statute, when such grantee has the clear right to repudiate the discharge of the debt and to enforce it exactly as before the subsequent deed or mortgage was delivered to him. See New York cases, *supra*.

4. *Cary v. White*, 52 N. Y. 138 (dicta); *O'Brien v. Fleckenstein*, 86 App. Div. (N. Y.) 140, *aff'd* 180 N. Y. 350; *Jones v. Robinson*, 77 Ala. 499. What was said in the preceding note with reference to payment applies with equal force to a so-called extension of time as value. Since the subsequent grantee or mortgagee may repudiate the extension because of the failure of title in the grantor and debtor, it follows that his position is not changed, and he has not parted with value. To destroy the real ownership and title of the first purchaser under the unrecorded deed because of the purely theoretical injury to the subsequent purchaser is merely to give effect to the fraudulent scheme of the grantor who alone profits by the transaction. This would seem to be injustice, bad morals and bad law.

There is, in fact, no binding extension in such case except on the assumption that the subsequent grantee or mortgagee gets a valid title under the statute, which is begging the question at issue. The law seems well settled, however, that an extension of time in consideration of a mortgage given as collateral security for a past debt is value under the statute.⁵

The money or value must be parted with before the subsequent purchaser receives notice of the prior unrecorded instrument. He is not protected if he pays over the purchase price after getting notice, since he has the right to refuse to accept the defective title which is offered.⁶ Even where the subsequent deed or mortgage has been executed and delivered, the subsequent grantee or mortgagee is not protected if he has not parted with the purchase price or amount of the loan or other thing of value which he was to give therefor.⁷ Part payment before receiving such notice will protect him to the extent of the payment made only.⁸ The giving back of a bond and mortgage or other non-negotiable security is not value, since the subsequent purchaser has a defense to their enforcement against him because of the failure of the title transferred to him.⁹

§ 334. Instrument Must Appear in Chain of Title.—The record of a conveyance or other instrument purporting to convey or affect any parcel of land is not constructive notice to subsequent purchasers or encumbrancers unless it appear in the "chain of title," so that a due examination of the

5. See last two notes preceding.

6. *Patten v. Moore*, 32 N. H. 382; *Blanchard v. Tyler*, 13 Mich. 339; *Schultze v. Honfes*, 96 Ill. 335.

7. *Schultze v. Honfes*, 96 Ill. 335.

8. *Baldwin v. Sager*, 70 Ill. 503; *Youst v. Martin*, 3 Serg. & R. (Pa.) 423.

9. *Westbrook v. Gleason*, 79 N. Y. 23 (bond and mortgage given for en-

tire purchase price. Not purchaser for value in usual case. Here purchaser made contract to purchase before the first mortgage was made and therefore in equity he comes in ahead of it. The surrender of this equity in giving second mortgage was value under the statute); *Roseman v. Miller*, 84 Ill. 297; *Beck v. Ulrich*, 13 Pa. St. 636.

title to the land involved will disclose its existence. Instruments of record are indexed against the names of the grantors and grantees, or mortgagors and mortgagees, as the case may be, forming a complete chain, so that the searcher may trace the different conveyances from grantor to grantee forward, or backward from grantee to grantor. Thus if A conveys land to B, who fails to record his deed, and B conveys to C, whose deed is duly recorded, the record of the deed from B to C is not constructive notice thereof to a subsequent purchaser in good faith from A. In examining A's title he would find no deed from A to B, since it had not been recorded, and he would have no means of finding the record of the deed from B to C, since B is a stranger to the title as far as the record is concerned C's deed does not appear in the chain of title.¹ For the same reason the record of a conveyance of an equitable interest is not notice thereof to a subsequent purchaser in good faith of the legal title. He is not called on to search against the name of the equitable owner, having no actual or record notice of the existence of his interest. His deed does not appear in the chain of title.²

Where a person conveys or mortgages land to which he has no title, and the deed or mortgage is duly recorded, if such grantor or mortgagor subsequently gets title to the property and conveys it thereafter to a purchaser in good faith and for value, the former deed or mortgage is not constructive notice to the subsequent purchaser, as he is not required to search against the name of his grantor for in-

1. *Page v. Waring*, 76 N. Y. 463; *Hetherington v. Clark*, 30 Pa. St. 393. *Chicago v. Witt*, 75 Ill. 211; *Roberts v. Bourne*, 23 Me. 165. So where an unauthorized deed of executors was recorded, it was held not to be notice to a subsequent purchaser for value in *Blake v. Graham*, 1 Oh. St. 580.

2. *Tarbell v. West*, 86 N. Y. 280.

See *contra*, *Edwards v. McKernan*, 55 Mich. 520, erroneously holding that the prior deed, if recorded, is notice, whether it appear in the regular chain of title or not. Of course in all these cases if the searcher actually finds the prior instrument, which ordinarily would be by chance, he has actual notice.

struments executed by him prior to his taking title to the property. The prior instrument is not in the chain of title.³ In such case if the conveyance or mortgage is with warranty the first grantee or mortgagee gets title by estoppel upon the subsequent acquisition of title by his grantor or mortgagor, as against him and as against any person taking title from him who is not a purchaser for value and without notice. A subsequent innocent purchaser for value is protected, not only by the recording acts, but also by the fact that the legal title has been conveyed to him as such innocent purchaser, and the equitable right of the first purchaser arising by estoppel is cut off.⁴ Nevertheless it has been decided in several states that if the prior deed or mortgage has been recorded it is constructive notice to the subsequent purchaser, who is not protected either by the recording acts or by the doctrine that one who takes the legal title as a purchaser for value takes free of outstanding equities in others, the prior deed or mortgage thus prevailing over the subsequent one.⁵ Courts so deciding have erred in two respects; 1st, in applying the obsolete doctrine of estoppel by deed at law, which does not properly apply at all to modern deeds, the courts holding in these cases that the legal title actually vests in the first purchaser through estoppel by deed, so that no title at all passes to the second purchaser, preventing the application of the doctrine of purchaser for value without notice, and secondly, in disregarding the fact that the first deed or mortgage, though recorded, does not appear in the chain of title, since the

3. *Bingham v. Kirkland*, 34 N. J. Eq. 229; *Calder v. Chapman*, 52 Pa. St. 359; *Van Rensselaer v. Kearney*, 11 How. 297; *Salisbury Sav. Soc. v. Cutting*, 50 Conn. 113 (dicta). See reporter's note at end of last case reviewing the case and discussing the principles involved.

4. See cases in preceding note.

5. *Tefft v. Munson*, 57 N. Y. 97 (see strong dissenting opinion); *Ayer v. Philadelphia, etc. Co.*, 159 Mass. 84 (admits that the rule is anomalous and, by implication, bad, but states rule is too well established to change it except by statute); *Powers v. Patten*, 71 Me. 583.

grantor or mortgagor was a stranger to the title when the prior instrument was executed and recorded.⁶

§ 335. Recorded Instrument Must be Entitled to Record.

—The record of an instrument which is not entitled to record under the statute is not constructive notice to subsequent purchasers or incumbrancers. Thus if it is not properly executed, or acknowledged or proved as required by

6. At common law title by estoppel arose only in case of a conveyance by feoffment with warranty, by fine or by common recovery. See Rawle Covenants for Title (5th ed.), § 243; Doe d. Christmas v. Oliver, 10 Barn. & C. 181. We have seen that these forms of conveyance are obsolete or expressly abolished, and to-day in England there is no such doctrine in connection with the modern conveyances, whether with warranty or not. In the situations discussed in the text the only estoppel recognized to-day in the modern English cases is estoppel by representation, or so-called equitable estoppel, arising out of the grantor's express or implied representation of title, which he is estopped from denying. See Williams Real Prop. (18th ed.), 476; Rawle Covenants for Title (5th ed.), §§ 244, 246, 264; Gen. Finance, etc. Co. v. Liberator, etc. Co., 10 Ch. Div. 15.

The American cases cited in the preceding note have taken and applied the obsolete doctrine of estoppel by deed, though it actually results in a fraud upon the subsequent innocent purchasers. Their holding that by relation he is bound by record notice of the prior instrument, though it is not in the chain of title, is utterly without reason. The court in *Calder v. Chapman*, 52 Pa. St. 359, quotes

with approval Judge Nelson in *Van Rensselaer v. Kearney*, 11 How. 297: "It (estoppel) is a doctrine when properly understood and applied that concludes the truth in order to prevent fraud and falsehood, and imposes silence on a party only where, in conscience and honesty, he should not be allowed to speak." In *Bingham v. Kirkland*, 34 N. J. Eq. 229, the court said that it is a mistake to use this doctrine to defraud a subsequent purchaser or mortgagee. The position taken in *Ayer v. Philadelphia, etc. Co.*, 159 Mass. 84, also above referred to, that the mistake is too firmly fixed in the law to be disturbed is a too common instance of failure of duty on the part of the courts. The law is as they declare it, and if a mistake has been made which results in its application in positive injustice in every case, as this rule must, there would seem to be no good reason for perpetuating its injustice, particularly as its effect upon rights already existing would be only to prevent or remedy injustice without interfering in any way with any valid right. The power to declare the law necessarily carries with it the power to correct an admitted error where that can be done without injustice to existing rights.

law before it can be recorded, the recording of it gives no notice under the statute.⁷ So the record of an executory contract of sale is not record notice,⁸ nor is the record of any other instrument the recording of which is not required by the statute.⁹ For the same reason the record of a void deed is not constructive notice thereof.¹⁰

§ 336. Defects in the Record.—The instrument is a matter of record so as to give constructive notice to subsequent purchasers as soon as it is filed for recording, though not actually recorded in due course until some time later. It is at once entered on the index when received, so that its existence is at once disclosed on a search. The index is not part of the record under the statutes of most of the states, and therefore a failure to index the instrument or an error in entering it in the index on the part of the recording officer does not affect its validity or the sufficiency of its record as notice.¹

Errors of the recording officer in the actual recording of the instrument makes the record ineffective to the extent of

7. Fryer v. Rockefeller, 63 N. Y. 268; Bradley v. Walker, 138 N. Y. 291; Graves v. Graves, 72 Mass. 391; Bishop v. Schneider, 46 Mo. 472; Girardin v. Lampe, 58 Wis. 267 (defective acknowledgments in above cases); Carter v. Champion, 8 Conn. 549 (incompetent subscribing witness); Raconillat v. Sausevain, 32 Cal. 376 (lack of seal).

8. Boyd v. Schlesinger, 56 N. Y. 301.

9. Davidson v. Crook, 45 App. Div. (N. Y.) 616 (sheriff's certificate of sale).

10. Forged deed, Marden v. Dorthy, 160 N. Y. 39; deed by record owner, another being in adverse possession. Green v. Horn, 128 App. Div. (N. Y.) 686.

1. Mutual Life Ins. Co. v. Duke, 87 N. Y. 257; Bedford v. Tupper, 30 Hun (N. Y.) 174; Stockwell v. McHenry, 107 Pa. St. 237; Bishop v. Schneider, 46 Mo. 472; Green v. Garrington, 16 Oh. St. 548. See 24 Am. & Eng. Cyc. Law 108. See *contra* under special statutory provision; Barney v. McCarty, 15 Iowa 510; Kock v. West, 118 Iowa 468, and Lombard v. Culbertson, 59 Wis. 433.

In New York indices under the block system are specially required for New York and Kings Counties. They are made part of the record and if error is made therein, record of the instrument affected is not constructive notice. See Fowler's Real Prop. L. (3d ed.), 1017.

the error. Subsequent purchasers may rely on the record as it is, and any loss resulting falls on the person who had the instrument recorded, he in turn having an action against the recording officer.² In several states the courts hold that in such case the loss falls on the subsequent purchaser, the first grantee or mortgagee having done all that he can be expected or is required to do when he files the instrument for record. It is urged that as the legal title is in him, and as apart from the statute his rights are paramount, he ought not to be deprived of his property because of the negligence of the recording officer over whom he has no control.³ On the other hand the public interest clearly demands that the record be conclusive so that a subsequent purchaser may rely on it in searching the title to the property which he is purchasing.

§ 337. Record is Notice to Subsequent Purchasers and Incumbrancers Only.—The record of an instrument of title is constructive notice only to those whose interest in the property is acquired subsequent to the recording of the instrument. Those whose interests have already been acquired, whether as purchasers or mortgagees, are not called on to search the title thereafter, as all instruments thereafter recorded will necessarily be subject to their title.⁴ It is for this reason that a prior mortgagee to secure future advances

2. *Purdy v. Huntington*, 42 N. Y. 334; *Gillig v. Maas*, 28 N. Y. 191; *Mut. Ins. Co. v. Dake*, 87 N. Y. 257; *Bernard v. Campau*, 29 Mich. 162 (mistake as to land covered); *Sawyer v. Adams*, 8 Vt. 172 (recorded in wrong book); *Gilchrist v. Gough*, 63 Ind. 576 (amount of mortgage debt incorrectly recorded); *Jenning's Lessee v. Wood*, 20 Oh. 261 (wrong name of grantee); *Pringle v. Dunn*, 37 Wis. 449; *Cady v. Purser*, 131 Cal. 552.

3. *Merrick v. Wallace*, 19 Ill. 486;

Kiser v. Heuston, 38 Ill. 252; *Lewis v. Hinman*, 56 Conn. 55; *Gillespie v. Rogers*, 146 Mass. 610 (see line of cases cited in this case); *Wood's Appeal*, 82 Pa. St. 116. See 24 Am. & Eng. Cyc. of Law 114.

4. *Ackerman v. Hunsicker*, 85 N. Y. 49; *Sherman v. Foster*, 158 N. Y. 587; *George v. Wood*, 91 Mass. 80; *Davis v. Monroe*, 187 Pa. St. 212; *Corey v. Smalley*, 106 Mich. 257; *Karus v. Olney*, 80 Cal. 90.

has no record notice of subsequent mortgages or other liens, and therefore to subordinate their later advances to the lien of a subsequent mortgage, judgment or the like, actual notice thereof to the first mortgagee must be proved in addition to proof that the later advance was voluntary.

It is frequently provided that the prior unrecorded instrument will be void as to subsequent purchasers and incumbrancers for value and in good faith who record their deed or mortgage first. When so expressly provided the subsequent instrument must actually be recorded before the prior instrument is recorded to give it validity or priority, though if the instrument is received for value and without notice it is effective though actual notice of the prior instrument is received thereafter before the subsequent instrument is recorded, provided it is thereafter recorded ahead of the prior instrument.⁵ In the absence of an express provision to this effect the subsequent instrument is valid as against the prior unrecorded instrument though the subsequent instrument is not recorded, provided it has been taken for value and without notice.⁶

§ 338. Purchaser With Notice From Purchaser for Value Without Notice.—As the subsequent purchaser for value without notice of the prior unrecorded deed gets a perfect title free of any claim on the part of the holder of the unrecorded instrument it follows that he may convey or mortgage the same title to any third person, whether his grantee or mortgagee has notice of the prior instrument or not, and whether or not the prior instrument has been recorded after he acquired title and before the conveyance to such third person.⁷ The only exception is where the title is conveyed

5. N. Y. Real Prop. Law, § 291; 1 Stim. Am. St. Law, § 1611; Westbrook v. Gleason, 79 N. Y. 23.

6. Sanborn v. Adair, 29 N. J. Eq. 338. See statutes in the different states.

7. Clark v. McNeal, 114 N. Y. 287; Bell v. Twilight, 18 N. H. 159, 166; Johnson v. Gibson, 16 Ill. 294 (analogous case of fraudulent conveyance, not involving recording acts); Huling v. Abbott, 86 Cal. 423.

back again to the original grantor. In that case the original grantor will not be permitted to set up the title so acquired as against the unrecorded instrument, as to do so would be a manifest fraud.⁸

§ 339. Subsequent Conveyances by a Purchaser With Notice.—It hardly need be said that where a purchaser with notice conveys to a purchaser for value without notice, the latter is fully protected by the statute. The record discloses nothing which indicates the existence of a prior conveyance.¹ But where the original purchaser records his deed after the conveyance to the subsequent purchaser with actual notice, and such subsequent purchaser thereafter conveys to a purchaser for value without actual notice of the first deed, a nice question is presented as to whether the record of the first deed is constructive notice to the subsequent innocent purchaser. The prevailing view seems to be that the recording acts do not protect the subsequent innocent purchaser. The second purchaser took with notice and therefore had no title which he could convey, and the subsequent innocent purchaser had constructive notice, as the first deed from the original grantor had been recorded before he took title.² The difficulty with this is that the original deed does not appear in the chain of title, because not recorded until after the conveyance to the second purchaser. The third innocent purchaser, on examining the title, would find this conveyance to the second grantee, and having no notice of the prior deed he would have a right to assume that it was valid. He would, therefore, not be called on to search further for any deed from the same grantor

8. See cases in preceding note.

1. This situation falls directly within the express terms of the statutes. See cases and statutes referred to heretofore on general application of the recording acts.

2. *Van Rensselaer v. Clark*, 17

Wend. (N. Y.) 25; *Jackson v. Post*, 11 Wend. (N. Y.) 588; *Bayles v. Young*, 51 Ill. 127; *Van Aken v. Gleason*, 34 Mich. 477; *Fallass v. Pierce*, 30 Wis. 443; *Maloney v. Middleton*, 41 Cal. 41, citing several cases.

subsequently recorded. The correct solution has been arrived at in Massachusetts, the court holding that the first deed is not recorded properly so as to bring it within the chain of title, and therefore its record gives no constructive notice. Its record is at most only evidence of actual notice, if it can be shown that the third or innocent purchaser actually discovered it in his search.³

§ 340. Subsequent Liens of Judgments.— In many of the states subsequent judgment liens are either expressly protected by the statute as against prior unrecorded deeds or other instruments of title or the statute is so construed, so that such unrecorded instruments are void as to such subsequent judgment creditors as well as to subsequent purchasers or encumbrancers for value and without notice.⁴ In New York and several other states judgment creditors are not regarded as purchasers for value, and therefore judgment liens are subject to prior unrecorded deeds and mortgages.⁵

3. *Morse v. Curtis*, 140 Mass. 112; *Day v. Clark*, 25 Vt. 379 (case of unrecorded mortgage and later mortgage with notice duly recorded and subsequent record of first mortgage followed by conveyance to an innocent purchaser, who was held to be protected by the statute).

4. *Condit v. Wilson*, 36 N. J. Eq. 370; *Sharp v. Shea*, 32 N. J. Eq. 65; *McFadden v. Worthington*, 45 Ill. 362; *Cox v. Milner*, 23 Ill. 476; *Wilkins v. Bevier*, 43 Minn. 213; *Paine's Lessee v. Moreland*, 15 Oh. 435.

5. *Moyer v. Hinman*, 13 N. Y. 180; *Shirk v. Thomas*, 121 Ind. 147.

CHAPTER XXIII.

TITLE BY ADVERSE POSSESSION.

§ 341. **Nature and Origin.**— By the statute 20 Henry III, ch. 8, a limitation was imposed upon actions to recover the possession of land in the adverse possession of another, the action being barred if the possession dated back to the reign of Henry II, a period of seventy years. By 3 Edw. I, ch. 39 (1275), the period of adverse possession barring the action was fixed from the time of Richard I, a period of eighty-eight years, constantly increasing as time passed. By the statute 31 Henry VIII, ch. 2, a flat period of limitation of sixty years was established. The Statute of Limitations, 21 James I, ch. 16 (1623), finally fixed the period of limitation of actions to recover possession of real property at twenty years, which is the present period of limitation in most of the states.¹ Some of the modern statutes expressly provide that adverse possession for twenty years or more shall give the possessor title to the property, but in most cases there is no such provision, the statute merely barring any action to recover the property from the adverse possessor.² The decisions have been quite uniformly to the effect that adverse possession for the requisite period gives title, however, whether the statute so expressly provides or not, so that a deed sufficient to satisfy the statute of frauds is

1. In England the period of limitation has been twelve years since 1879. See Stat. 37 & 38 Vict. c. 57. Digby Hist. L. Real Prop (5th ed.), 427. The statutes in the different states vary so widely that it would not be practicable to discuss them here. In the majority of states the period is still twenty years, in some states fifteen years, and in other states a

still shorter period of limitation is provided for.

2. The modern English statute referred to in the preceding note so provides, though the law was settled to the same effect under the earlier statutes which contained no such provision. See statutes in the different states.

necessary in order that title may revert in the original owner, mere abandonment of possession by the adverse holder being ineffective for that purpose after the twenty year period has elapsed.³ The adverse possessor becomes as completely vested with the title in fee as he would upon a conveyance in due form from the owner of record, the full period of twenty years' adverse possession having been completed.⁴

§ 342. What Constitutes Adverse Possession.—To gain title by adverse possession there must have been for the requisite period 'actual physical possession of the land claimed, it must be open, exclusive, continuous, and actually adverse to the interest of the true owner. There must have existed in the true owner the immediate right at any time during the period of recovering the possession by ejectment or other appropriate action, and it is because he has failed to exercise this right for too long a time the right is taken away from him and title is given to the adverse possessor.¹

The Possession Must Be Actual. Mere title of record adverse to the true owner does not affect him. The adverse

3. School Dist. No. 4 of Winthrop v. Benson, 31 Me. 381; Schall v. Williams Valley R. Co., 35 Pa. St. 191 (holding that title of adverse holder who abandons possession after holding adversely for over 20 years is not affected by the recording acts, and is good as against a subsequent purchaser); Riggs v. Riley, 113 Ind. 208.

4. Thus the adverse possessor for the statutory period becomes so vested with the legal title that he only, and not the record owner, can maintain trespass for trespasses committed after his title has become complete. Hughes v. Graves, 39 Vt. 359; Phillips v. Kent & Miller, 3 Zabriskie (N.

J.) 155; Wilkes v. Greenway, 6 Times L. R. 449 (holding, however, that a way of necessity will not arise out of mere adverse possession of the inner parcel for the statutory period, though as a practical matter such right would ordinarily arise by prescriptive user in such case); Baker v. Oakwood, 123 N. Y. 16 (holding that adverse possessor may maintain ejectment as owner after twenty years); Barnes v. Light, 116 N. Y. 34; Way v. Hooton, 156 Pa. St. 8; McDuffee v. Sinnott, 119 Ill. 449.

1. See cases in notes immediately following.

claimant must actually enter upon and possess the land claimed for the period fixed by the statutes.²

It Must Be Open. If the acts of user on which the adverse possession is based are secret or hidden, so that the true owner did not know of them nor could be expected to discover them by reasonable inspection of the property, there is no adverse possession within the rule. Such acts would be trespasses merely, giving the owner an action for damages, but no action in ejectment to be barred by the statute of limitations.³ But if there is open physical possession of the property by the adverse holder as owner it is immaterial whether the true owner actually knows of it or not. He is bound by it if he should have discovered it by coming on the property and inspecting it either personally or through a representative. His absence in a foreign country, for instance, during the entire period, would be quite immaterial, the possession being actually open and adverse.⁴

The Possession Must Be Exclusive. If the adverse claimant was in possession in common with the true owner, no disseisin of the true owner has been accomplished. The true owner was in possession throughout, and therefore no right of action in ejectment existed in his favor to be barred by the statute. The adverse claimant in such case was either a licensee or a trespasser only, in neither case having a possession legally adverse.⁵ So if his alleged possession is in common with others, all occupying and using the land

2. Ward v. Cochran, 150 U. S. 597; Fould v. Bond, 41 N. J. L. 527, 545 (the court saying: "The possession must be actual and exclusive, adverse and hostile, visible and notorious, continued and uninterrupted"); Christy v. Spring Valley Water Works, 97 Cal. 21.

3. St. Louis, etc. R. Co. v. Nugent, 152 Ill. 119; McClellan v. Kellogg,

17 Ill. 498; Jackson d. Hardenberg v. Schoonmaker, 2 Johns. (N. Y.) 230; De Frieze v. Quint, 94 Cal. 653.

4. Ward v. Warren, 82 N. Y. 265 (analogous case of prescription); Samuels v. Borrowscale, 104 Mass. 207.

5. Bellis v. Bellis, 122 Mass. 414; O'Hara v. Richardson, 46 Pa. St. 385.

without any claim of exclusive right, in any one or in all together, all are merely trespassers, their possession not being that of owners claiming exclusively, and it is therefore not adverse.⁶ Of course if two or more persons occupy the land exclusively, possessing and making use of it as cotenants in fee, the possession is exclusive of all others and is adverse for that reason.⁷

The Possession Must Be Continuous. If the adverse possessor abandon his possession before the period of the statute has elapsed, and after an interval resumes possession again, the statute begins to run again as of the time when the possession is resumed, the first period not counting.⁸ A new cause of action in ejectment arises out of the new entry and disseisin. The original cause of action in ejectment arising out of the first period of adverse possession ceases to exist when the possession is voluntarily abandoned. Of course twenty years must elapse after the second entry and disseisin before the new cause of action in ejectment arising therefrom is barred. It must be remembered that merely quitting the premises temporarily, without an intent to abandon them permanently, is not an abandonment and is therefore not an interruption of the period of adverse possession.⁹

An entry by the true owner made openly with intent to resume possession, or an open recognition of the true owner's rights on the tenant's part constitute an interruption, the statute running only from the resumption of adverse possession thereafter.¹⁰ The mere starting of an ejectment

6. *Kneller v. Lang*, 137 N. Y. 589; *Bailey v. Carleton*, 12 N. H. 9 (laying of lumber on premises and placing farm tools there, by claimant and also by others, showed no claim to exclusive possession).

7. *Putney v. Gresser*, 2 Met. (Mass.) 583; Litt. § 278.

8. *Downing v. Mayes*, 153 Ill. 330; *Bliss v. Johnson*, 94 N. Y. 235; *Bowen v. Guild*, 130 Mass. 121; *Stephens v. Leach*, 19 Pa. St. 262.

9. *Hughes v. Pickering*, 14 Pa. St. 297.

10. *Warren v. Bowdran*, 156 Mass. 280; *Bowen v. Guild*, 130 Mass. 121;

suit is not an interruption, nor is a judgment in ejectment unless it is actually enforced by putting the owner in possession.¹¹

The Possession Must Be Actually Adverse or Hostile. Possession by a licensee, by a tenant during his term, by a life tenant, by a mortgagee in possession, by an agent or servant as against his principal or employer, or by a tenant in common as against his cotenant, is not adverse in each case because it is in recognition of and subordinate to the title of the true owner.¹² In these cases if it appear that the occupant has openly and notoriously repudiated his subordinate interest, and holds openly and adversely as absolute owner, the possession is adverse and the statute will bar the owner's right to the property if he fails to assert it in time.¹³

The possession is adverse to, and the statute runs only against, those entitled to immediate possession. Thus where A has a life estate in the property, remainder in fee in B, possession by a third person is adverse to A only during A's life estate, and during his life his right alone is barred. The statute does not begin to run against the remainderman until after the death of the life tenant, as the remainderman's right to the possession and right to maintain ejectment does not arise until then.¹⁴

Ingersoll v. Lewis, 11 Pa. St. 212; Burrows v. Gallup, 32 Conn. 493; Lovell v. Frost, 44 Cal. 471.

11. Moore v. Greene, 19 How. (U. S.) 69; McGrath v. Wallace, 85 Cal. 622.

12. Meacham v. Bunting, 156 Ill. 586; Peabody v. Tarbell, 2 Cush. (Mass.) 226; Martin v. Jackson, 27 Pa. St. 504; Catlin v. Decker, 38 Conn. 262; Miles v. Thorne, 38 Cal. 335. As to adverse possession as between cotenants, see § 214, *ante*.

As to adverse possession by a tenant for years, see DeLancey v. Ganong, 9 N. Y. 9.

As to mortgagees in possession, see Holmes v. Turners Falls Co., 150 Mass. 535; Morris v. Ile, 152 Ill. 190. As to licensees, see Sanitary Dist. v. Chicago, 178 Ill. 330.

13. See preceding note, also Sherman v. Champlain Transportation Co., 31 Vt. 162, 177, and cases therein cited.

14. Foster v. Marshall, 22 N. H.

The Possession Need not be Under Any Color of Title. Statements in the books and cases that the possession must be under a claim of right mean only that it must be an actual adverse possession, as heretofore explained, the adverse possessor exercising the usual rights of ownership, actually using and enjoying the property as owners usually do.¹⁵ Thus where an owner encroaches on his neighbor's land, enclosing it and making use of it adversely for the required period, he becomes owner by adverse possession, though he intended to claim only to the true boundary. His possession was actually adverse, though without intent to trespass. Intent in such case is immaterial. As ejectment would lie against him during the entire period of his possession, the statute bars the action and gives him title.¹⁶ In some states it has been held that the possession in such case is not adverse, based on the mistaken notion that it must be intentionally hostile.¹⁷

491; *Koltenbrock v. Cracraft*, 30 Oh. St. 584; *Pinckney v. Burrage*, 31 N. J. L. 20; *Mettler v. Miller*, 129 Ill. 630; *Wallingford v. Hearl*, 15 Mass. 471.

15. *Mount v. Murphy*, 207 N. Y. 240 (possession, improvement and exercise of usual acts of ownership is presumptively adverse possession until shown to be subservient to another's title); *Sumner v. Stevens*, 6 Met. (Mass.) 337 (a holding under a parol gift was adverse, since possession was that of owner, irrespective of the invalidity of the gift). See *Rathbunville Cem. Ass'n v. Betson*, 208 N. Y. 364.

The nature of the possession must be shown by the conduct of the adverse possessor in the enjoyment of the property. A continued residence on the land, the cultivating, improving and fencing it, and other acts of ownership tend to establish that there was an actual open adverse posses-

sion, the possessor holding and making use of the property exactly as though he was in fact owner of it. *Johns v. McKibben*, 156 Ill. 71; *Susquehanna, etc. R. Co. v. Quick*, 68 Pa. St. 189; *Butler v. Drake*, 62 Minn. 229; *Brumagin v. Bradshaw*, 39 Cal. 24, 50

See, also, cases cited under § 343, *post*.

16. *French v. Pearce*, 8 Conn. 439 ("Into the recesses of his [the possessor's] mind, his motives or purposes, his guilt or innocence, no inquiry is made. It is for this obvious reason that it is the visible and adverse possession with an intent to possess, that constitutes its adverse character, and not the remote views or beliefs of the possessor"); *Tolman v. Sparhawk*, 5 Metc. (Mass.) 469; *Crary v. Goodman*, 22 N. Y. 170; *Dyer v. Odridge*, 136 Ind. 654; *Greene v. Anglemire*, 77 Mich. 168.

17. *Grube v. Wells*, 34 Iowa 148,

§ 343. **Constructive Possession.**— If possession is taken and continued for the requisite period under color of title, that is, under a deed, will, judgment or other instrument of title, possession of part of the parcel described therein is constructive possession of the balance thereof, so as to give title to the entire parcel by adverse possession.¹ The usual case is where a farm or other limited and well defined parcel is described in the deed or other instrument, and the usual and customary practice of owners is to occupy and improve or otherwise make use of part, reserving the balance as woodland or waste and unoccupied land for future use in connection with the part actually occupied. Adverse possession of the part usually occupied in such case is a disseisin of the real owner as to the entire parcel where the disseisor holds under a void or voidable deed or other instrument purporting to give him title to the unoccupied part as well, the instrument of title disclosing and determining the extent of his claim. He is in possession of the entire parcel just as though his paper title were good, and the true owner may maintain ejectment to oust him from the entire tract so described. Therefore the running of the statute gives him title to all.²

This rule does not apply to extensive tracts of land, where a small part is occupied and where the balance is too extensive to be regarded as part of a farm or other subdivision held in reserve for use in connection with the part actually

and cases therein cited; *Ayers v. Reidel*, 84 Wis. 276; *Brown v. Gray*, 3 Greenl. (Me.) 126; *Winn v. Abeles*, 35 Kan. 85; *Brown v. Corkerell*, 33 Ala. 38; *St. Louis Univ. v. McCune*, 28 Mo. 481. The later cases have modified the original rule by holding that the possession is adverse if the possessor believes that his fence to which he holds is the true line, his possession being not adverse when it appears that he intended to claim

only to the true line, wherever it may be. *Taylor v. Fornby*, 116 Ala. 621, 626; *Shotwell v. Gordon*, 121 Mo. 482; *Miller v. Mills Co.*, 111 Iowa 654; *Richardson v. Watts*, 94 Me. 476, 3 Gray's cases (2d ed.), 59, note.

1. See cases in notes following.

2. *Jackson, etc. v. Woodruff*, 1 Cowen (N. Y.) 276; *Stull v. Rich Patch Iron Co.*, 92 Va. 253; *Reedy v. Canfield*, 159 Ill. 254.

occupied and improved. In such case ejectment would lie only as to the part actually occupied, and the statute would run, barring the action, only as to that part. The physical possession must indicate to the real owner that the claim of the adverse holder extends beyond the limits of the part actually occupied, which would not be the case except where such possession by an owner carried with it in the usual case possession and control of the unoccupied portion.³

Where the void instrument of title includes land belonging to two or more persons, actual possession of land belonging to one of them is not constructive possession of the parcels belonging to the others. So, where two or more distinct parcels are described in the instrument under which possession of one of them is held, there is no constructive possession of the other parcels. In each of these cases the actual possession of one parcel gives no indication of any further claim to the other parcels, and the rule of constructive possession has no application.⁴ The land in which constructive possession is claimed must be part and parcel of a single tract, part of which is in the actual possession of the adverse claimant, the balance going therewith as a usual and customary matter, the description of the instrument of title establishing that his possession of a part is under claim as owner to the entire parcel.⁵

This rule, obviously, does not apply where the true owner is in possession of another part of the parcel, since his constructive possession of the balance is disturbed by an ad-

3. See *Jackson v. Woodruff*, 1 Cowen (N. Y.) 276 (the court saying: "Suppose a patent granted to A for 2,000 acres; B, without title, conveys 1,000 of the tract to C, who enters under the deed, claiming title, and improves one acre only. * * * Could it be gravely urged that there was a good adverse possession to the one thousand acres? * * * No such doctrine was ever intended to

be sanctioned by the court"); *Simpson v. Downing*, 23 Wend. (N. Y.) 316; *Thompson v. Burhans*, 61 N. Y. 52; *Paine v. Hutchins*, 49 Vt. 314.

See *contra*, *Hicks v. Coleman*, 25 Cal. 122.

4. *Bailey v. Carleton*, 12 N. H. 9; *Grimes v. Ragland*, 28 Ga. 123; *Hole v. Ritterhouse*, 25 Pa. St. 491.

5. See cases in preceding note, also *Morris v. McClary*, 43 Minn. 346.

verse holder only to the extent of the parcel so adversely held.⁶

Where adverse constructive possession has been once secured, a subsequent adverse possession of another part of the parcel will not effect the constructive possession of the first hostile claimant, except to the extent of the part so actually occupied. His constructive possession as presumptive owner necessarily excludes any constructive possession in the subsequent disseisor.⁷

§ 344. Tacking Possession of Succeeding Adverse Holders.

—A continued adverse possession by succeeding adverse holders without interruption or break results in giving title after twenty years, or other period fixed by statute in the state where the property is situated, provided some relationship between them is shown, proving that each succeeding holder did, in fact, continue the prior adverse possession of his predecessor. Thus where the adverse holder conveys or devises the property, or dies intestate and the possession is continued by his heir or heirs, the succeeding interests are tacked so as to make a single continuous period of adverse possession.¹ A parol or other transfer, which would be void

6. *Stull v. Rich Patch Iron Co.*, 92 Va. 253 (holding, however, that subsequent possession of another part of a greater tract belonging to the true owner does not prevent the adverse holder's possession from extending to the entire parcel included within his deed, no part of such latter parcel being in the actual possession of the true owner); *Hale v. Powell*, 4 Serg. & R. (Pa.) 456; *Jackson v. Vermilyea*, 6 Cow. (N. Y.) 677.

7. *Jackson v. Vermilyea*, 6 Cow. (N. Y.) 677; *Ralph v. Bayley*, 11 Vt. 521; *Bradley v. West*, 60 Mo. 33.

1. *Fanning v. Wilcox*, 3 Day (Conn.) 258; *Sawyer v. Kendall*, 10

Cush. (Mass.) 241; *Jackson v. Leonard*, 9 Cow. (N. Y.) 653; *Shrack v. Zubler*, 34 Pa. St. 38; *Ryan v. Schwartz*, 94 Wis. 403; *Ely v. Brown*, 183 Ill. 575; *San Francisco v. Fulde*, 37 Cal. 349.

In *Smith v. Chapin*, 31 Conn. 530, the court said: "But it (privity of estate) was not necessary. It is sufficient if there is an adverse possession continued uninterruptedly for fifteen years, whether by one or more persons. * * * Doubtless the possessions must be connected and continuous, so that the possession of the true owner shall not constructively intervene between them; but such

as a conveyance by the true owner, is sufficient for this purpose, as it establishes that the same adverse possession is continued by the grantee, without interruption.² But where the adverse holder gives up possession, a new disseisin by a third person who enters independently without privity of any sort with the prior possessor, gives no right to tack his possession to that of his predecessor, because at the instant of the surrender of possession by the prior holder the constructive possession of the true owner at once attaches, the new disseisin and adverse possession gives rise to a new action of ejectment, and this action will not be barred until the full period of limitation fixed by the statute, beginning at that date, has fully elapsed.³

Where the adverse holder devises or conveys the property to one person for life, remainder to another, the remainderman may tack the period of adverse possession of the life tenant with that of the deviser or grantor, since it is obviously a continuation of the same adverse possession.⁴

continuity and connection may be affected by any conveyance, agreement or understanding which has for its object a transfer of the rights of the possessor, or of his possession, and is accompanied by a transfer of possession in fact." A transfer of possession under an agreement to sell was held to be sufficient.

2. See case last cited, also *McNeely v. Langan*, 22 Oh. St. 32; *Hughes v. Pickering*, 14 Pa. St. 297; *Davock v. Nealon*, 58 N. J. L. 21; *Ill. Steel Co. v. Budzisz*, 106 Wis. 499.

3. In *Sawyer v. Kendall*, 10 Cush. (Mass.) 241, the court said: "Separate successive disseisins do not aid one another, where several persons successively enter on land as disseisors, without any conveyance from one to another, or any privity of estate between them, other than

that derived from the mere possession of the estate. * * * If there is no such privity, upon the determination of the possession of each disseisor, the seisin of the true owner revives and is revested, and a new distinct disseisin is made by each successive disseisor." See, also, cases in last two preceding notes.

4. The mere intentional transfer of possession, though without any conveyance, either by parol or by deed, is quite sufficient for a tacking of the succeeding possessions. Thus where A held adversely a piece of land not included within his deed, in the mistaken belief that it was so included, and later conveyed to B by the same description which did not include the additional parcel so held, a continued adverse possession by B was held to be tacked to A's pos-

§ 345. **Disabilities.**—The statutes of limitations in the different states generally provide that if the true owner is under a disability, such as infancy or insanity, when his right to enter and recover possession of the property accrues, the time in which he must bring his action to recover possession is extended by the period of his disability, but not to exceed a stated number of years, generally ten, after the disability is removed, or after the death of the person under the disability.⁵ The disability must exist at the time the cause of action to recover possession because of the disseisin accrues. If, for instance, A is owner of the property in question when the adverse possession starts, under no disability at the time, but later he becomes insane, his right to recover the property will be barred after twenty years, the adverse possession ripening into legal ownership exactly as though he had not become insane. Similarly, if after five years, or any other period less than twenty, A should die, the property passing to an infant heir, the disability of the infant would make no difference, the disability not existing in the true owner when the adverse possession started.⁶

If A, in the above case, was an infant when the adverse possession started, and shortly before attaining his twenty-first year he should become insane, the second disability does not in any way affect the running of the statute. The twenty year period is extended for ten years (or other statutory period) after the disability of infancy is removed, but

session, since possession was surrendered from A to B by voluntary act. *Erick v. Church*, 87 Tenn. 575; *Weber v. Anderson*, 73 Ill. 439; *Wishart v. McKnight*, 178 Mass. 356. and cases therein cited.

5. See statutes in the different states for widely varying provisions as to period of extension allowed in case of disability, and the different situations, in addition to infancy and

mental incapacity, which are made disabilities in many states, such as coverture, absence from the United States, and imprisonment. See *Wood Limitations* (3d ed.), § 237; N. Y. Code Civ. Proc., § 375.

6. *Griswold v. Butler*, 3 Conn. 227; *Allis v. Moore*, 2 Allen (Mass.) 306; *Fleming v. Griswold*, 3 Hill (N. Y.) 85; *Lynch v. Cox*, 23 Pa. St. 265.

no further extension is given because of the second disability of insanity.⁷

The general nature of title by prescription is sufficiently discussed in the sections on creation of easements. Title by estoppel is explained in discussing the different topics in connection with which the question arises, particularly in the chapter on Recording of Deeds. Title by will and by descent are generally treated as a distinct branch of the law, as is the subject of mortgages, and are, therefore, not specifically treated in this work, though the law on these subjects, is discussed in this work in so far as it is involved in connection with the topics treated.

7. *Bunce v. Wolcott*, 2 Conn. 27; *Serg. & R. (Pa.)* 209; *White v. Clau-*
Demarest v. Wynkoop, 3 Johns. Ch. son, 79 Ind. 188; *Cozzens v. Farnan*,
(N. Y.) 129; *Thompson v. Smith*, 7 30 Oh. St. 491.

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